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A

SELECTION OF CASES

ILLUSTRATING

EQUITY PLEADING AND
PRACTICE

WITH

DEFINITIONS AND RULES OF THE UNITED STATES
SUPREME COURT RELATING THERETO

BY

E. RICHARD SHIPP, LL.M.

AND

JOHN B. DAISH, A. B., LL.M.,

Of the District of Columbia Bar.

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1901.

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TO
CHARLES CLEAVES COLE,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA,
IN RECOGNITION OF HIS LEARNING
AND
IN APPRECIATION OF HIS STERLING PERSONAL QUALITIES
THIS VOLUME
BEGUN AT HIS SUGGESTION
AND
PERSEVERED IN UNDER HIS ENCOURAGEMENT
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EQUITY PLEADING.

THE pleadings in equity are the written statements of the parties, setting out in conformity with certain established rules, the matters and facts relied upon by the respective parties to the suit, in order to maintain or defeat it, or to obtain or prevent the equitable interposition of the Court concerning the relief sought (Story).

A suit in Equity is instituted by a bill, sometimes called a petition; this is a statement of the grounds on which the complainant bases his right to equitable relief.*

Bills are divided into :

I. Bills Original, including all those in which the same persons, having the same interests are first before the Court for determination of rights. Bills Original are :

(a) Those praying relief, *i. e.*, seeking for the adjudication upon the merits of the identical suit before the Court to ascertain present existing rights and remedy present wrongs. Technically bills for relief must ask for a decree of Court. Bills praying relief may be

1. For specific performance, *i. e.*, for the execution of a contract.
2. For Partition, *i. e.*, for the severance of joint estates.
3. Bill of Peace, *i. e.*, for the perpetuation of the general exclusive right in the complainant against numerous parties who dispute it or where the right is claimed by numerous complainants against the defendant.

4. Bill *Quia Timet*, *i. e.*, for relief against apprehended inconvenience, danger or injury.
5. Bill for Foreclosure, *i. e.*, to compel the sale of mortgaged premises and bar the right of redemption.
6. Bill to Redeem, *i. e.*, to compel the mortgagee to accept payment and reconvey.
7. Bill for Injunction, *i. e.*, to restrain the defendant from committing an irreparable injury or to compel the performance of some act.

(Each of the above bills prays a decree of the Court touching some right claimed by the complainant in opposition to the defendant.)

8. Bill of Interpleader, *i. e.*, to determine in whom is the right of possession of personal property.
9. Certiorari Bill, *i. e.*, to remove a cause from a lower to a higher Court. (Seldom used.)

(b) Those not praying relief, *i. e.*, to prevent future apprehended injury or affecting suits in the courts of law. (The distinctions between these and bills praying relief is not a mere matter of form, but goes to the life of the bill.) Bills not praying relief are :

1. Bill to Perpetuate Testimony, *i. e.*, to preserve evidence which is in danger of being lost before the question now before the Court can be determined.
2. Bill *De Bene Esse*, *i. e.*, to preserve evidence which is in danger of being lost before the controversy is made the subject of an action.
3. Bill for Discovery, *i. e.*, to compel disclosure of facts of which the defendant has knowledge, information or belief or documents in the possession or control of the defendant.

II. Bill not Original, including those in addition to or a continuance of, an original bill, or both, and relate to

some matter already in controversy between the same parties or their privies. Bills not Original are :

1. Supplemental Bill, *i. e.*, for matter arising subsequently to the commencement of the suit; the matter may give a new interest to a person not a party to the bill, or occasion a change of the interest, or the matter may entitle the complainant to more extensive relief than prayed for.
2. Bill of Revivor, *i. e.*, in continuance of an original bill, when the suit would otherwise abate by reason of the death of one of the parties or by the marriage of a female complainant.
3. Bill of Revivor and Supplement, *i. e.*, to revive the original suit and also to supply defects or set up new facts which have arisen subsequent to the filing of the original bill.

III. Other Bills, those which are technically in the nature of original bills not praying relief and which cannot be classified as original bills and bills not original. Other Bills are :

1. Cross Bill, *i. e.*, to secure to the defendant cross relief from the plaintiff or other parties to the suit.
2. Bill of Review, *i. e.*, to correct errors apparent on the face of the decree; also where new matter has come to the knowledge of one of the parties after publication passed; this by leave of Court and only by parties to the record or their privies.
3. Bill in the Nature of Bills of Review, *i. e.*, to correct errors apparent on the face of the decree after it has been signed and enrolled; this bill is brought by a person not bound by the decree.
4. Bill to Impeach a Decree on the Ground of

Fraud, *i. e.*, to set aside a decree of the Court which has been rendered under a fraud or imposition.

5. Bill to Avoid or Suspend the Execution of a Decree, *i. e.*, to stay the execution of a decree either temporarily or permanently.
6. Bill to Carry a Decree into Execution, *i. e.*, to revive a dormant decree or add new parties after decree signed and enrolled, where the new parties have interests similar to the litigants, or are in privity with them.
7. Bill in the Nature of a Bill of Revivor, *i. e.*, in continuance of an original bill where the suit has abated by the death of a party or for any other reason, and where the change of interest has taken place by the act of the parties.
8. Bill in the Nature of a Supplemental Bill, *i. e.*, where the interest of a party wholly determines and the property becomes vested in another not claiming through him.

The Parts of a bill are :

1. The Address, containing the title and style of the Court.
2. The Introductory part, containing the names, places of abode, and citizenship of the parties, and the right in which they sue and are sued.

(In present practice the address and introductory parts are considered as one.)

3. The Premises, or stating part, containing the complainant's case.
4. The Confederating Part, containing a statement of conspiracy between the parties defendant and others unknown. (This clause is not generally used.)
5. The Charging Part, containing the pretenses which the complainant supposes the defendant will set up for ex-

- cuse or justification and then charging other matter to avoid them. (Unnecessary at the present time.)
6. The Jurisdictional Clause, containing an allegation that the acts complained of are contrary to Equity. (Unnecessary at the present time, but the bill as an entirety must show sufficient equity to give the Court jurisdiction.)
 7. The Interrogating Part, containing the particular facts concerning which the complainant requires an answer. (The requirements of the particular case must determine whether or not interrogatories shall be propounded.)
 8. The Prayer for Relief, which may be special (praying for the particular relief to which the complainant thinks he is entitled), or general (praying for such other and further relief as the Court may think equitable).
 9. The Prayer for Process, containing a request for the issuance of the writ of subpoena.
 10. Signature of Solicitor as an evidence that the bill is a proper one. (And in Federal Courts the bill must be verified by oath or affirmation of complainant.)
-

NATURE AND MODES OF DEFENSE.

Defense is either : 1, Peremptory, or 2, Dilatory.

The Modes of Defense are :

1. Disclaimer, wherein the defendant denies that he has any right, title, or interest in the subject matter of the suit, or knowledge, information or belief concerning the same.
2. Demurrer, which is either general (going to the whole bill and assigning no particular cause) or special (designating the parts of the bill intended to be attacked). A demurrer lies for error apparent on the face of the bill and must be in writing, but causes other than those specified may be argued *ore tenus*. A demurrer contends that the case as shown in the bill, (admitting it for the

sake of argument to be correct) is not such as to demand an answer either because, as stated, it does not contain some essential element necessary to the right, or because the right is avoided by some fact contained in the bill itself, or because the bill is multifarious, scandalous or impertinent.

(Scandal is any matter which it is not becoming the dignity of the Court to hear or which reflects on a party. Impertinence consists of needless prolixity, as setting forth deeds in *hæc verba*. Multifariousness is the allegation of matters entirely distinct and unconnected, or the introduction of parties having no interest in the subject matter or decree.)

3. Plea, which is either (*a*) affirmative, in the nature of a special answer setting up and relying on one or more facts not alleged in the bill as a cause why the suit should be delayed, dismissed or barred; (*b*) negative, denying one or more facts set up in the bill as a cause why the suit should be delayed, dismissed or barred; and (*c*) anomalous, reasserting and relying upon some fact stated in the bill and which is therein impeached and denies the facts and charges relied on as a ground for impeachment.

(A plea must be supported by an answer when, (*a*) the complainant admits the existence of a legal bar, and alleges some equitable circumstances to avoid its effects and interrogates as to these circumstances and (*b*) when the complainant does not admit the existence of a legal bar and states some equitable circumstances which may be true, and to which there may be a valid plea, together with other circumstances inconsistent with the substantial validity of the plea, and interrogates as to the latter circumstances.)

4. Answer, which is the response of the defendant to the interrogatories contained in the bill. Generally speaking, however, an answer is the pleading in which the defendant takes up the allegations of the bill, paragraph by paragraph, and replies thereto, either by way of plea, demurrer or disclaimer.

Exceptions to Answer is the method whereby a complain-

ant objects to the sufficiency of the defendant's answer, either in matters of form or substance.

A decree is the sentence or judgment of the Court pronounced after the hearing or submission of the cause. Decrees are (*a*) interlocutory, pronounced for the purpose of ascertaining matters preparatory to final decree; and (*b*) final, pronounced for the purpose of fully deciding and disposing of the whole merits of the cause and reserving no questions or directions for the future judgment of the Court.

A motion is an interlocutory application by or on behalf of a party to the suit. A petition may be preferred by one a party to the suit or not. These proceedings relate to the amendment of pleadings, appointment of receiver and other matters which may arise after the filing of the original bill, and independent thereof. •

JURISDICTIONAL RULES.

I.

EQUITY HAS NO JURISDICTION WHERE THE REMEDY AT LAW HAS ALWAYS BEEN PLAIN, ADEQUATE AND COMPLETE.

(1) The foregoing rule lies at the foundation of the system of equity jurisprudence. Equity does not create rights which the common law denies. It had its origin as we have seen in the necessity for specific, and more effectual, remedies for wrongs and injuries where the law either gave no substantial redress, or, by reason of the special circumstances of the case, the redress given was inadequate and practically unavailing.

(2) It is not enough that there is a remedy at law; in order to exclude equity, it must be "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

Boyce v. Grundy, 3 Pet., 210, 215; *Tyler v. Savage*, 143 U. S., 79, 95; *Kilbourn v. Sunderland*, 130 U. S., 505, 514; *Rich v. Braxton*, 158 U. S., 375, 400.

The remedy must be *plain*; that is, neither doubtful nor obscure.

It must be *adequate*; that is, it must not fall short, in any material particular, of the right to which the party is entitled.

It must be *complete*; that is, it must be able to secure the right of the party in every particular at the present and for the future.

Telf v. Stewart, 31 Mich., 367; *Frue v. Loring*, 120 Mass., 507; *Watson v. Sutherland*, 5 Wall., 74; *North v. Peters*, 138 U. S., 271; Pom. Eq. Jur., Sec. 180; *Riley v. Carter*, 76 Md., 581, 597; *Scarborough v. Scotten*, 69 Md., 137, 140.

(3) EQUITY IN THE FEDERAL COURTS.

(a) The Constitution of the United States declares that "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority."

This has been held, from the beginning, as preserving the distinction between common law and equity as it existed in England at the time of the adoption of the Constitution. "The remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of State courts but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." (*Robinson v. Campbell*, 3 Wheat., 212, 223. See Equity Rule 90.)

The Judiciary Act of 1789 declared that suits in equity should not be sustained in any case where "plain, adequate and complete remedy may be had at law."

The Supreme Court has held to the strict observance of this rule and has often refused to follow the practice of the State courts under statutes extending jurisdiction in equity to cases formerly cognizable only at law, save in special cases where the general subject matter is of an equitable character or founded on some recognized ground of equity interposition.

Cates v. Allen, 149 U. S., 451; *Scott v. Neely*, 140 U. S., 106; *Lindsay v.*

Shreveport Bank, 156 U. S., 185, 493; Whitehead *v.* Shattuck, 138 U. S., 146; Gormley *v.* Clark, 131 U. S., 338; Langdon *v.* Sherwood, 124 U. S., 74; Holland *v.* Challen, 110 U. S., 15; Wehrman *v.* Conklin, 155 U. S., 311; Buzard *v.* Houston, 119 U. S., 347; Lewis *v.* Cocks, 23 Wall., 466; Thompson *v.* R. R. Co., 6 Wall., 131; Hipp *v.* Babin, 19 How., 271; Boyce *v.* Grundy, 3 Pet., 210; Russell *v.* Clark, 7 Cranch, 69, 89; Osborne *v.* M. P. Ry. Co., 147 U. S., 248, 258; N. Y. Guaranty Co. *v.* Memphis Water Co., 107 U. S., 205, 214.

(b) Ordinarily, the want of jurisdiction in equity, when not apparent on the face of the bill, must be brought to the attention of the court by plea or answer. (Wylie *v.* Cox, 15 How., 415, 420.)

But the court may, of its own motion, dismiss a bill for want of jurisdiction when, from the allegations, or the proofs, it is plain that there is no proper case in equity.

Lewis *v.* Cocks, 23 Wall., 466; Oedriehs *v.* Spain, 15 Wall., 211, 228; Allen *v.* Pullman Palace Car Co., 139 U. S., 658, 662.

Where, however, the subject matter is one within the general scope of the jurisdiction in equity, the objection that there is a plain, adequate and complete remedy at law, in the particular case, must be made *in limine*.

Reynes *v.* Dumont, 130 U. S., 354, 395; Hollins *v.* Briarfield Coal & Iron Co., 150 U. S., 371, 380; Merwin Eq., §§ 104-109.

A decree, therefore, in such cases, or in one where, the question being made, the court has erroneously determined that it had jurisdiction, is binding and cannot be impeached collaterally.

Mellen *v.* Moline Iron Works, 131 U. S., 352, 367.

II.

EQUITABLE JURISDICTION IS, IN GENERAL, NOT OUSTED BY A SUBSEQUENT EXPANSION OF THE LEGAL REMEDY.

(1) Bispham says, upon excellent authority: "If a court of equity has originally assumed jurisdiction over a particular class of cases, it will not, as a general rule, be ousted from that jurisdiction simply because, in the progress of common

law improvement, redress comes to be subsequently attainable at law."

Pr. of Equity, 5 ed., p. 62; 1 Story Eq. Jur., Sec. 64, i; 1 Pomeroy Eq. Jur., Secs. 182, 276, 277; *Sweeny v. Williams*, 36 N. J. Eq., 627; *Simmons Creek Coal Co. v. Doran*, 142 U. S., 417, 449.

(2) Nor will the jurisdiction be considered as ousted by a statute giving a remedy at law. The statutory remedy will be regarded as cumulative unless the contrary intention be expressed or shown by necessary implication.

Darst v. Phillips, 41 Ohio St., 514; *Phillips v. Kelly*, 12 Or., 213; *Sweeny v. Williams*, 36 N. J. Eq., 627; *Lee v. Lee*, 54 Ala., 590; 1 Story Eq. Jur., Sec. 80; 1 Pom. Eq. Jur., Sec. 182.

(3) An important exception to the general rule, is, that a court of equity will not now entertain a bill by the assignee of a strictly legal right merely because he cannot bring an action at law in his own name; for the reason that he has a plain and adequate remedy at law by an action in the name of his assignor, to his own use.

Walker v. Brooks, 125 Mass., 241; *Hayward v. Andrews*, 106 U. S., 672, 677; *N. Y. Guaranty Co. v. Memphis Water Co.*, 107 U. S., 205, 214; *Glenn v. Marbury*, 145 U. S., 499, 508; *Notes to Ryall v. Rowles*, 2 L. C. Eq., 4 ed., pp. 1567 and 1670.

III.

EQUITY JURISDICTION, HAVING ONCE ATTACHED TO A CASE, WILL BE MAINTAINED FOR THE PURPOSE OF COMPLETE RELIEF THROUGH THE FINAL ADJUDICATION OF ALL RIGHTS INVOLVED.

(1) The prime object of this rule is the prevention of a multiplicity of suits, which is a favorite doctrine of equity.

It means that when its jurisdiction has been invoked, in good faith, for a purpose clearly within its powers, a court of equity will proceed to administer complete and effectual relief though in so doing it may become necessary to determine some questions, ordinarily cognizable alone at law. For example: equity has no jurisdiction to award compensation

in damages when that is the remedy sought; but if the bill seeks other relief, that can only be given in equity, and damages are incidental thereto it will proceed to award them.

Merchants Ins. Co. v. Tayloe, 9 How., 390; *Phoenix Ins. Co. v. Ryland*, 69 Md., 437; *Lynch v. Metropolitan El. Ry. Co.*, 129 N. Y., 274; *McGean v. Met. El. Ry. Co.*, 133 N. Y., 9; *Pom. Eq. Jur.*, Secs. 181, 231, 242; *Tyler v. Savage*, 143 U. S., 79, 97; *Gormley v. Clark*, 131 U. S., 338, 349; *Milkman v. Ordway*, 106 Mass., 232; *Combs v. Scott*, 76 Wis., 662, 671; *Virginia A. M. & M. Co. v. Hale*, 93 Ala., 542; 3 *Pom. Eq.*, Sec. 1410.

(2) The doctrine has been extended to the granting of relief to the defendant, by way of cross-bill, in a subject matter which, if independently prosecuted, would be cognizable only at law.

Sunflower Oil Co. v. Wilson, 112 U. S., 313, 325; *Chicago, etc., Ry. Co. v. Chicago Bank*, 134 U. S., 276, 288.

(3) The rule is subject to the qualification, that the mere allegation of a ground of equity jurisdiction, or of exclusive equitable relief, is not sufficient. So, where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it transpires can not, for defect of proof or for other reason, be granted, the court is without proper jurisdiction and should dismiss the bill without prejudice.

Russell v. Clark, 7 Cranch, 69, 89; *Dowell v. Mitchell*, 105 U. S., 430; *Rogers v. Durant*, 106 U. S., 644; *Buzard v. Houston*, 119 U. S., 347, 354; *Morss v. Elmendorf*, 11 Paige Ch., 277; *Dudley v. Congregation of St. Francis*, 138 N. Y., 451, 458; *Sauer v. Ferris*, 145 Ill., 115; *Palmer v. Fleming*, 1 App. D. C., p. 533; *Kennedy v. Hazleton*, 128 U. S., 667, 671; *Merwin Eq.*, § 398.

IV.

COURTS OF EQUITY HAVE NO INHERENT JURISDICTION IN EITHER OF THE FOLLOWING CASES:

1. TO PREVENT THE COMMISSION, OR INTERFERE WITH THE PROSECUTION, OF CRIMES.

2. OVER THE ELECTION OR APPOINTMENT AND REMOVAL OF PUBLIC OFFICERS.

(1) One of the earliest instances in which equity exercised

jurisdiction, in order to supply the deficiencies in remedies at law, was, where, in cases of assault and trespass and other outrages by violence, the petitioner for relief alleged that "he was unable to obtain redress owing to the position or powerful connections of his adversary." Out of this grew the writ of *supplicavit*, which was granted upon the complaint of a suitor of the court that he had been abused and stands in danger of his life from another suitor, to take the offending party into custody and compel him to give bail for his good behavior. (Bispham Eq., Sec. 8; Adams Eq., Introduction, XXXI.)

With the exception of the foregoing remedies, which themselves were really founded upon an infringement of rights of property and which also soon fell into disuse, equity jurisdiction has, from the first, limited itself to the protection of civil rights, as distinguished from cases of criminal cognizance.

Injury to property or rights of property, actual or prospective, is the ancient and sure foundation upon which the jurisdiction rests.

In re Sawyer, 124 U. S., 200; Cope v. District Fair Association, 99 Ill., 489; Crighton v. Dahmer, 70 Miss., 602; Atty. Gen. v. Tudor Ice Co., 104 Mass., 239; Atty. Gen. v. Utica Ins. Co., 2 Johns. Ch., 371; Sheridan v. Colvin, 78 Ill., 237; Cochrane v. McLeary, 22 Iowa, 75; 1 Pomeroy Eq., Sec. 197; High on Injunctions, Secs. 20, 68, 272; Kerr v. Corp. of Preston, L. R., 6 Ch. Div., 163; Sauls v. Browne, 10 Ch., 64.

(2) Of late years there has been a disposition, in some of the States, to confer jurisdiction in equity for the prevention of offences that affect public morals and are therefore declared public nuisances; for example, selling liquor, gambling, and keeping disorderly houses. It has been held that such legislation is not inconsistent with the constitutional guarantees of liberty and property and trial by jury.

Mugler v. Kansas, 123 U. S., 623, 670; Eilenbacker v. Plymouth Co., 134 U. S., 31.

(3) The rule has this important qualification: Equity will not refuse to restrain the doing of an act where serious and

irreparable, or inestimable damage would result to private property, simply because it might also be punished as a crime. It will, therefore, enjoin the commission of nuisances and continued trespasses and destruction of property notwithstanding the acts may be offences against the criminal laws. In such cases the remedies are concurrent.

The protection of property, or private rights, ought, however, clearly to appear to be the real motive, and not the enforcement of a criminal law.

In *re Debs*, 158 U. S., 564; *Arthur v. Oakes*, 63 Fed. Rep., 310; *Toledo, etc., R. Co. v. Penna. Ry. et al.*, 54 Fed. Rep., 730; *Cranford v. Tyrrell*, 128 N. Y., 341; *Marsan v. French*, 64 Tex., 175; *Mobile v. I. & N. R. R.*, 84 Ala., 115; *Carlisle v. Cooper*, 21 N. J., Eq., 576; *Sherry v. Perkins*, 147 Mass., 212.

CHAPTER I.

JURISDICTION OF EQUITY COURTS—MISCELLANEOUS RULES.

Rule 90.

In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

Rule 1.

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

Rule 2.

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining and disposing of all motions, rules, orders and other proceedings, which are grantable of course, and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

Rule 3.

Any judge of the circuit court, as well in vacation as in

term, may, at chambers, or on the rule-days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary, at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.

Rule 4.

All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

Rule 5.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and

execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

Rule 6.

All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

LEWIS v. SHAINWALD.

(Circuit Court for California: 7 Sawyer, 403-418. 1881.)

Opinion by SAWYER, J.

STATEMENT OF FACTS.—This is a bill in equity, called by appellant's counsel a creditor's bill, based upon a prior proceeding, in which a decree had been entered in the district court against the respondent, appellant here, for a large sum of money, and execution issued, upon which a return of *nulla bona* had been made.

It is claimed by the respondent that, prior to the adoption of the Revised Statutes in the state of New York, no such thing as a creditor's bill, in the sense since used, was known; that a creditor's bill of the character here set forth was unknown to the court of chancery; and that, therefore, the case is not properly one of equity jurisdiction. Upon this proposition some decisions of the English courts are cited; and it appears that some of the later decisions overrule some of the former ones upon certain points.

In this connection equity rule 90 is cited as having a bearing upon the case, as prescribing that the English chancery practice shall be adopted in cases where our equity rules do not apply. That rule is as follows:

“In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery of England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.”

. In my judgment, that rule does not in any way affect the question. The jurisdiction of this court is derived from the Constitution and laws of the United States, and these rules are simply rules of practice, for regulating the mode of proceeding in the courts. They do not, and could not, properly, either limit or enlarge the jurisdiction of the court. The rule quoted simply regulates the practice in exercising the jurisdiction of the court in those respects wherein the rules adopted do not apply; but the practice of the high court of chancery is to be applied, not as controlling, but simply as furnishing just analogies to regulate the practice.

I am satisfied that creditors' bills, of some kinds, whether of the precise character of that now under consideration or not, were entertained both by the English chancery courts and in the courts of chancery in the several states, particularly in the courts of New York, prior to the adoption of the Revised Statutes of the latter state. The creditors' bills which were recognized previous to that time were, perhaps, in different form from that then adopted; but there undoubtedly were instances of bills maintained by creditors to subject the assets of debtors to the payment of their debts. The discussions upon the subject related mainly to the character of the assets and the circumstances of the particular case.

In the case of *Hadden v. Spader*, 20 Johns., 554, before the court of errors, and in which the decision of Chancellor Kent sustaining a creditor's bill is affirmed, I think the rule is established that certain assets can be reached and appropriated by a bill filed by a creditor; and several prior cases recognized the same principle.

In the subsequent case of *Donovan v. Finn*, Hopk., 59,

there was suggested some limitation. That case, however, did not overrule, or purport to overrule, as it could not, the decision of the court of errors in the case last referred to. Indeed, the two decisions, as to the real point involved and decided, do not conflict. The latter case was one into which the element of fraud, either actual or constructive, did not enter. It was simply a case where a legacy had been left to a debtor, which was in the hands of an executor, and a creditor's bill was filed to reach that legacy. There was no collusion or fraud, or voluntary conveyance, or other subject-matter of equity jurisdiction in the case. The debt was treated as an honest debt; and the chancellor held that it could not properly be reached by a creditor's bill. He recognizes, however, the propriety of filing such bills in cases of fraud. Frauds and trusts are in themselves subjects of equity jurisdiction. Indeed, matters of fraud and trusts are among the most extensive heads of equity jurisdiction. Wherever there is fraud in a case which cannot be fully remedied at law, equity intervenes and uncovers the fraud; and the fact that a creditor is injured by a fraudulent concealment or withholding of property brings him into such relations to the fraudulent transaction that he may, on that ground, invoke the equitable jurisdiction of a court of equity; have the fraud uncovered, and take hold of the funds or the property fraudulently concealed and withheld from him. He comes within the jurisdiction of the court, not merely because he is a creditor; not because his bill is a creditor's bill; but because he presents a case in which he sets forth matters of fraud or trust; and equity entertains his bill simply because he stands in such a relation to the fraudulent transaction that he is entitled to have the fraud uncovered, or a trust declared and enforced.

This principle is recognized in the case last referred to. I read from the decision as reported in 14 American Decisions, page 533. After stating that "it is apparent that this case does not belong to any general head of equitable jurisdiction, such as frauds, trusts, accidents, mistakes, accounts, or the specific performance of contracts;" that "there is neither fraud, nor trust, nor accident, nor any other ingredient of equitable jurisdiction," the chancellor proceeds to say:

"The English cases cited proceeded, as I conceive, not upon the ground of subjecting the credits of the judgment debtor to

the payment of his debts, but upon some ground of equitable jurisdiction, as fraud or trust, existing in each case. . . . The case of *Bayard v. Hoffman*, 4 Johns. Ch., 450, was not the case of a judgment creditor; but the object of the suit was to annul an assignment in trust, made by a debtor without consideration. The assignor was insolvent when the assignment was made; that fact not being then known, no actual fraud was intended; but the assignment had all the operation of fraud against the creditors of the insolvent debtor; and for these reasons the cause was of equitable jurisdiction. . . .

"The case of *Hadden v. Spader*, 5 Johns. Ch., 280, and 20 id., 554, was also a case of an assignment by an insolvent debtor of property upon various trusts. It was clearly a case of trust; the assignment was charged to have been made by fraud, and, though the answers denied that fraud was intended, the facts exhibited a case of fraud. The effect of the assignment, if it had prevailed, would have been to withdraw and screen from execution the property of the debtor; the assignment was held to be void, and the judgment creditor had relief. These are the principal cases which have been adjudged in this court, and in all of them some acknowledged ground of equitable jurisdiction existed. In general they were suits to set aside conveyances, which prevented the seizure of property by the sheriff, and the conveyances have been considered frauds, either actual or constructive. . . .

"In giving relief in such cases, this court does not proceed upon the idea of giving execution against a species of property which is exempt from execution at law; but it acts upon some of the most ancient grounds of its jurisdiction, which enable it to give relief in cases of fraud and trust, either to a judgment creditor or to any other person whose just rights may be destroyed or impeded by such a cause. . . .

"I fully concur with Judge Platt in his opinion given in the case of *Hadden v. Spader*, and in his view of the powers and jurisdiction of this court, in respect to the rights and remedies of creditors. The case now to be decided has not one feature of equitable jurisdiction. In it there is neither fraud, nor trust, nor conveyance of property, nor any interruption of the effect of an execution or the due course of justice at law. . . .

"But when equity has jurisdiction, by reason of some disposition of the debtor's property, made in fraud of the

creditor, and when, in such a case, the sheriff of the county in which the property is situated returns upon the execution that no property is found, the return is important evidence to show that the fraudulent disposition has had effect by preventing the service of the execution. By the existing law, the property of a debtor consisting of things in action held by him without fraud is not subject to the effect of any execution issued against his property; and while a court of law does not reach these things by its execution, a court of equity does not reach them by its execution for the purpose of satisfying either judgments at law or decrees in equity.

"All conveyances made to defraud creditors are void, both in law and equity. When a fraud appears to a court of law, the conveyance is there adjudged void. When such a fraud is presented to this court, it is of equitable jurisdiction; and the property of the debtor fraudulently transferred is subject to the satisfaction of his debts, in favor of a creditor complaining of the fraud. Does an insolvent debtor transfer his property to another person in trust for himself, or in such a manner as to defeat the effect of a judgment and an execution? This is the frequent case. It is a case of both fraud and trust, and it is of equitable jurisdiction. It was the case of *McDermut v. Strong*, and of *Hadden v. Spader*. In all such cases this court vacates the fraud, sets aside the conveyance in trust, and, acting both upon the debtor and his trustee, it does complete justice to the creditor. Thus the jurisdiction of this court reaches, and reaches effectually, those cases of fraudulent conveyances and assignments in trust, which form the great and most vexatious impediment in the course of justice between creditor and debtor. Bills for discovery, where no relief is sought, also afford important aid to creditors against their debtors. But this court has no power to cause stocks, credits and rights of action, held by a debtor, without fraud, to be sold or converted into money, to be transferred to the creditor or to be applied to the payment of debts."

Now this is the distinction between this case of *Donovan v. Finn* and the other cases referred to. In the latter case it is the element of fraud which brings them within the jurisdiction; and a creditor, as well as any other party who is injured by the fraud, is able to maintain a bill to have the fraudulent act vacated, and to be relieved from the consequences of it.

In a note appended to the report of the case last cited it is said: "It is doubtful, where there has been no legislation upon the subject, whether, in the absence of fraud or any other well-known ground for supporting the exercise of its jurisdiction, equity will assist a creditor to reach those assets of his debtor which under no circumstances could have been subject to execution at law."

A large number of cases are then cited; and it is then added: "What stocks, choses in action, franchises and other property which was not subject to execution at common law, can now, in the absence of any statute on the subject, be reached by a creditor's bill, must still be regarded as unsettled. By such bills creditors have in several instances succeeded in obtaining satisfaction out of the interest of an heir or distributee while still in the hands of an executor or administrator." Then follows another citation of numerous authorities, which I have not examined, as I did not consider it necessary to this decision.

In this case the charge of fraud is set up in the bill, in which it is alleged that the respondent has made fraudulent transfers of his property; has converted portions of it into money, and secreted the proceeds; that other property, to the amount of many thousands of dollars, has been concealed from the complainant in order to prevent him from securing it by execution issued under the decree of the court; and that he is about to carry all his money and other property beyond the jurisdiction of the court; the notorious and declared purpose of all these acts being to defraud the complainant, and render it impossible for him to realize any portion of the amount to which he is entitled under the decree. By his demurrer the respondent admits these averments of the bill, and takes his stand upon the point that the court is without jurisdiction to entertain or determine a cause of the character of that which is set forth in the bill.

The case of *Mountford v. Taylor*, 6 Ves. Jun., 787, which has been cited here, was a case similar to the one at bar. The bill stated that the judgments were obtained at a time when "the defendant was, ever since has been, and now is, seized for his own use of freehold estates for his life or some greater estate; that the plaintiffs sued out writs of *legit* upon these judgments; but neither of them has been able to discover where the estates of the defendant are situate," and

does not know what they are or where they are. But the complainant charges that in or about the year 1795, some years before, the defendant, upon taking a seat in the house of commons, took the oath as to his having the requisite amount of property to qualify him to act as a member of that body, and that "he also delivered to the clerk of the house of commons, or some other officer of the house, a schedule, containing the particulars of the estate, whereby he made out his qualifications; and the plaintiffs are unable to obtain the said schedule." They also state that if, as he pretends, he has since conveyed the estates of which his qualification was composed, "such conveyance was without consideration, and in trust for himself:" and the bill prayed for a discovery.

The defendant demurred as to the main statements recited in the bill; Mr. Mansfield and Mr. Pemberton claiming, in his behalf, that the object of the bill was idle curiosity; that no creditor had a right to make these inquiries.

During the argument, the lord chancellor, throwing out suggestions, says: "It seems admitted that they have a right to come here for a discovery, where the property is, in order to make their judgments available. That certainly will not affect real property had before the judgment was obtained, if no longer under such circumstances that the creditor can follow it: but it does not follow that he cannot, merely because it does not remain in the ownership of the debtor; for there may be many cases in which he might. There is a material charge in this bill, that if there was any conveyance, it was without consideration."

There is no positive averment in the bill that there was a conveyance made by the defendant; but it alleges that, if there was a conveyance, it was made without consideration; and that, the lord chancellor says, is a material charge. He then proceeds to say: "First, in the common case will a bill for a discovery lie, with all this particularity, to know every estate he has sold and disposed of for three years? If so, he may go back forty years." He then remarks: "There is difficulty upon the objection, that this would extend to an estate parted with forty years ago, without consideration; and I am not quite clear that such a bill must not allege that at a given time the defendant was seized of given lands (not simply suggesting, as a fishing bill, that at some time or other he had some land); and that he conveyed these lands away fraudulently, to put them out of the reach of his creditor."

These remarks quoted were made by Lord Eldon during the argument : and he took the case under consideration, and on the 20th of March he overruled the demurrer, saying : "The bill is met by a defense, admitting that it is a proper bill ; and the answer does not negative all that is material to be answered. With respect to the nature of the qualification, if he had said the property he gave into the house of commons was not liable to execution, the court ought to be content with that, without requiring from him more particularity. But the bill charges that the defendant delivered in a schedule of the particulars of the estates, whereby he made out his qualification, and that he has conveyed them without consideration, as evidence that he has lands liable to execution ; as they may be unquestionably. Upon that I think he must answer."

In this case of *Mountford v. Taylor*, then, Lord Chancellor Eldon held that the conveyance of his estate by the defendant without consideration was fraud ; and that a creditor, as well as anybody else, might avail himself of it. In their bill the complainants in the case declare that they do not know the character of defendant's estates, nor where they are situated ; but that he had, upon taking his seat as a member of the house of commons, delivered to the clerk or other officer a verified schedule in which his estate was set forth, which schedule the plaintiffs are unable to obtain. All of the allegations of the bill with respect to the defendant's property are argumentative. The complainants further alleged, however, that the defendant had conveyed his estate, without consideration, and in trust for himself, and they were unable to find it.

These allegations of this creditor's bill are as indefinite as could possibly be ; yet the lord chancellor sustains the bill ; and his decision in that case, as well as the decisions in the cases of *Spader v. Hadden* and *Donovan v. Finn*, referred to, and numerous other cases cited in those decisions, sustain the ground that where the case presented is one of equitable jurisdiction, a creditor, as well as anybody else, is entitled to the aid of and redress from the court.

In the bill in the case at bar, it is alleged that the respondent has converted a certain portion of his property, to the amount of \$20,000, into cash, which he has concealed, with the intention of carrying it out of the United States ; that he has other property, to the amount of \$90,000, which

he has so arranged and concealed that he will be enabled to take it out of the United States; and that his express and declared purpose in so concealing and arranging his property, and in carrying out his intention of taking it away with him, is to fraudulently evade this complainant's execution.

✕ This bill has been designated by the appellant's counsel a "fishing bill." What is meant by this term is indicated by Lord Eldon in the cited case of *Mountford v. Taylor*, in the previously quoted language—"not simply suggesting as a fishing bill, that at some time or other he had some 'land,' which was a remark thrown out during the argument. Such a bill is one in which there are no allegations of a definite or positive character as to the defendant's having at any time owned property which could have been subject to execution upon the plaintiff's claim; or one asking for a discovery as to matters which cannot in any way affect the rights of the parties. It is evident, from the way he uses the expression, that it is to cases of that class that Lord Eldon refers. In that case it is alleged in the bill that at a certain time the defendant did have some property, which property he had since conveyed, if conveyed at all, without consideration, in trust for himself; and, although the complainants are unable to state where the property of the defendant is, the lord chancellor does not consider the bill a fishing bill, but overrules the demurrer and compels the defendant to answer with reference to that particular property.

The nature of a fishing bill is defined by Chancellor Kent (then a judge of the court of errors of New York) in the case of *Newkerk v. Willett*, 2 N. Y. Cases in Error, 296, in which he says: "The bill does not state sufficient equity to entitle the appellants to a discovery. It states generally that the respondent had made a demand upon one of the appellants, as executrix of Peter Schuyler, deceased, and that, as he did not produce any voucher, she had refused to pay him. It states further that he proposed an arbitration, which she refused, and that finally he had brought a suit against the appellants in the supreme court. The bill states further that the appellants know nothing of the demand of their own knowledge, but that they believe it unjust, because the respondent took no measures to liquidate and settle it in the life-time of Peter Schuyler, and does not now produce any vouchers, and has been inconsistent in what he has from time to time said as to the nature and extent of his demand.

“This is the substance of the bill: it amounts to this: the respondent has sued us at law, and we do not know for what, and therefore we ask for a discovery beforehand, although we have reason to conclude he has sued us upon some groundless pretense. Such a bill shows no equity, no right to a discovery. It sets forth no matter material to a defense at law, and which can be proven, unless by the confession of the opposite party. It is, to use Lord Chancellor Hardwicke’s expression, a mere fishing bill, seeking generally a discovery of the grounds of the respondent’s demands, without stating any right to entitle them to it. Such a bill may be exhibited by any executor or administrator, and indeed by any defendant, who is not already in possession of the plaintiff’s proofs. But the court of chancery has wisely refused to sustain bills for discovery in such latitude, and unless the party calling for a discovery will state some matter of fact material to his defense, or which he wishes to substantiate by the confession of the defendant, the court will not enforce a discovery.”

It is with this same view, as I understand it, that Lord Eldon, in the case before cited, alludes to a discovery of matters running back forty years—matters which cannot, by any possibility, affect the rights of the parties; and a bill asking for such a discovery is a fishing bill. But as to a bill for a discovery of matters of such character and date that they can be immediately connected with the complainant’s cause, and which matters he could not discover or ascertain without the aid of the court, the bill also alleging that, since the accruing of complainant’s right, the respondent has conveyed away his estates, without consideration and in trust for himself, such a bill is not a fishing bill, because it sets forth matters material to the cause. A conveyance of the character alleged would be a fraud in law, and the complainant is entitled to a discovery.

In the present case, the charge of fraud is direct. In his bill, after setting forth that he has recovered judgment against the respondent for a large sum of money; that execution has issued, and a return of *nulla bona* has been made thereon, the complainant avers that a short time before the rendition of judgment, and during the pendency of the action, the respondent disposed of, and converted into cash, real property to the amount of \$20,000; that since the rendition of the judgment he has secretly transferred a large part of his

property, and has secreted the remainder; that he has property to the value of \$90,000, which the complainant has been unable to reach by execution; that he intends and is about to convert into cash all his property, and to depart, taking it with him, beyond the jurisdiction of the court; and that all these acts and steps have been committed, taken and proposed with the declared purpose of so "fixing" his property that it cannot be seized to satisfy the judgment, and to defraud the complainant of the money due under it.

Those matters are material. Here is set forth the fraud which the complainant is seeking to unveil; and, if the alleged state of facts exists, he is entitled to apply the funds of the respondent, wherever they are, to the satisfaction of the judgment. The fact that the complainant is unable to describe and locate the property and funds of the respondent ought not to make it impossible to bring his cause within the jurisdiction of a court of equity, for under existing laws it is possible for a party to hold property in such a manner that only by a discovery can another be enabled to locate or describe it. If in a case of this kind a complainant were not entitled to a discovery, it would be possible for a debtor to conceal his property, or to convert it into money and put it in his pocket, and so evade a judgment. The arm of the court of equity would certainly be very short if it could not reach the respondent in such a case, although the complainant would be unable to describe the property or identify the money. In the nature of things it is impossible to identify the money. But if this respondent has in his possession the \$20,000 which he is alleged to have received for that portion of his property which he has sold, and other property as well, he is bound to discover it, and yield it up, that it may be applied to the satisfaction of the judgment. If, as is averred in the bill, the respondent in this case has converted a portion of his property into money, and intends to carry that money and his other property beyond the jurisdiction of the court, then this bill is sufficient.

Another point is made in this case, with reference to the issuing of a writ of *ne exeat republica*. Respondent's counsel contends that the court has erred in directing in its decree that the writ should issue; that such a writ is only a provisional remedy, the right to which expires upon the determination of the suit and the entry of judgment.

The very object of this provisional remedy is to secure the presence of the party in order that the judgment may be executed—in order that he may not be enabled to evade it. This writ is not discharged any more than an attachment is discharged upon the entry of judgment. A writ of attachment is discharged upon the satisfaction of the judgment, or upon giving security; and the writ of *ne creat* should continue in force until the judgment is satisfied, or until the writ is dissolved, or proper security given. *Mitchel v. Bunch*, 2 Paige, 606; S. C., 22 Am. Dec., 669; *McNamara v. Dwyer*, 32 Am. Dec., 631.

It is claimed by the respondent's counsel that that portion of the decree which directs that this writ shall issue is arbitrary; that no limit is placed upon the length of time it shall continue in force. I presume the court will have power to control that matter. The decree may possibly be too broad in that regard; and, if counsel desire it, it can be so modified as to obviate any objection upon that ground. That this writ may be issued even after judgment is established. See *Moore v. Hudson*, 6 Mad., 218; *Elliott v. Sinclair*, Jac., 515; *Collinson v. Wattleworth*, 18 Ves., 353; *Russell v. Ashby*, 5 Ves., 96.

According to Daniell's Chancery Practice, and many authorities, a prayer in the bill for a *ne creat* is not necessary. 3 Dan. Ch. Pr., 1936; *Durham v. Jackson*, 1 Paige, 629; *Gilbert v. Colt*, 14 Am. Dec., 561, note. It is sufficient if the facts alleged in the bill, and established, show a proper case for the writ, and it may be granted in the decree under the prayer for general relief. Or the facts may be shown, and the writ applied for upon a petition presented in the case either before or after judgment or decree. The limitation of equity rule 21 only applies where the writ is asked for "pending the suit."

"And it is further ordered, adjudged, and decreed, that the writ of *ne creat republica* of the United States of America issue out of and under the seal of this court, to restrain the said Harris Lewis from departing out of the jurisdiction of this court." That is the form of that portion of the decree relating to this matter. I think it would have been better, and it certainly would have avoided criticism, if to this had been added—"until the satisfaction of the decree, or the further order of the court."

Respondent's counsel cites a case in 2 Wash., to show that

a district court has no authority to issue a writ of *ne exeat*. In that case, however, the writ was issued by the judge, and not by the court. That case arose at a time when the jurisdiction of the district court was limited, and did not cover a case of the character of that now under consideration at all. There is a distinction between the judge and the court, a distinction recognized in the Revised Statutes. Section 717 reads :

“Writs of *ne exeat* may be granted by any justice of the supreme court, in cases where they might be granted by the supreme court; and by any circuit justice or circuit judge, in cases where they might be granted by the circuit court of which he is a judge. But no writ of *ne exeat* shall be granted unless . . . satisfactory proof is made to the court or judge granting the same, that the defendant designs quickly to depart from the United States.”

By the Revised Statutes, section 716, it is provided that “the supreme court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.”

The writ of *ne exeat* is one of the writs necessary to the exercise of the present jurisdiction of the district court. The jurisdiction of that court has been enlarged since the adoption of these statutes, and since the date of the decision last referred to. In cases of the character of the one at bar, it has now concurrent jurisdiction with the circuit court. The authority of the district court to issue this writ is therefore unquestionable.

The decree of the district court must be affirmed, except that, if the appellant so elects, it may be modified in the respect indicated.

UNITED STATES *v.* PARROTT.

(Circuit Court for California: 1 McAllister, 447-466. 1859.)

Opinion by McALLISTER, J.

STATEMENT OF FACTS.—In this case a bill was filed by the district attorney of the United States, in behalf of the government. Among other matters, it alleged that the title to the premises in dispute was in the United States; that defendants

had taken tortious possession of them; that they consisted of a mine of great value; that defendants had extracted minerals therefrom to the value of \$8,000,000; that they were extracting therefrom minerals to the annual amount in value of \$1,000,000, and threaten to continue the waste; that they were unable to respond for the damages which had already accrued and which would still accrue; that the defendants, in the name of one Andres Castellero, had presented a petition to the "Board of Land Commissioners," under the act of congress approved March 3, 1851, which was pending on appeal from the decision of the commissioners, before the district court of the United States for the northern district of the state of California, the object of which petition was to obtain from the United States a confirmation of the title which they pretended to hold from the Mexican government; that the title under which they held possession was forged, ante-dated and fabricated in pursuance of a conspiracy to cheat and defraud the United States of their rights to the said property. The bill concluded by charging that defendants were destroying the substance of the mine, and prayed that an injunction might issue to stay the waste defendants were committing, and threatened to commit, until the determination of their alleged title by the tribunals to which the adjudication of it was confided, and that a receiver be appointed. To this bill an answer was filed, and on the bill and answer the motion for injunction was argued and decided. The charges in the bill specifically made, of forgery and ante-dating of the documentary title under which defendants held, were not directly and fully denied; all that was averred was the ignorance of defendants of their existence, and their belief of the genuineness of the documents. In relation to the charge made in the bill of a conspiracy to cheat and defraud the United States, after admitting the genuineness of all the letters save one, appended to the bill, the answer, in response to the allegation of conspiracy, denies "that the said letters and communications were written by the said parties with intent to commit a fraud or in furtherance of a conspiracy to fabricate a title, as charged in said bill, except so far as the said intention appears from said letters on the part of the said James Alexander Forbes." So far, then, as the intention of conspiracy appears from the letters, it was admitted that "Forbes," under whom two of the defendants claimed, may be guilty. In view

of the insufficiency of the denials in the answer, the irreparable character of the mischief complained of, and the *prima facie* title of the complainants exhibited by the bill, answer and exhibits, the court granted the injunction and refused the appointment of a receiver.

The well-settled rules of chancery require that full, direct and positive denials should have been given to the charges of fraud, forgery, ante-dating and conspiracy. This doctrine is enunciated by uniform decisions. *Poor v. Carleton*, 3 Sumn., 77; *Clark v. Van Riemsdyk*, 9 Cranch, 160; *Everly v. Rice*, 3 Green, Ch., 553; *Roberts v. Anderson*, 2 Johns. Ch., 202; *Apthorpe v. Comstock*, 1 Hopk., 143; *Ward v. Van Bokkelen*, 1 Paige, 100. Independently of authority, reason and common sense affirm the propriety of the rule. The facts charged in the bill were forgery and ante-dating. These were not denied, but the ignorance of the defendants of their existence and their belief in the non-existence of them averred. In *Roberts v. Anderson*, 2 Johns. Ch., 202, Chancellor Kent has well said: "the defendants may have given all the denial in their power; but the fraud may exist notwithstanding, and consistently with their ignorance or the sincerity of their belief."

It has been suggested that the allegations of the forgery and ante-dating not having been sworn to from personal knowledge, *that* circumstance should modify the rule. No authority has, nor, it is believed, can be invoked to sustain a proposition so novel. The allegations of a bill properly made, which so clearly charge the fraud as to make it perfectly intelligible to the defendants, entitle the complainant to such a denial as is prescribed by the rules of chancery. If such an one is not put in, the defendant cannot arrest the issue of an injunction on the ground that he has filed an answer denying the equity of the bill. Relax that rule, and what might not be the injurious results?

There are many cases in which rights may be violated under circumstances which may warrant an honest belief that atrocious fraud had been perpetrated; but those circumstances may have transpired at a distance from the party, and he unable to swear to them from personal knowledge. Can it be contended with any reason, that when the party comes into a court of equity, that tribunal will award to an answer whose denials of forgery and ante-dating are made "upon informa-

tion and belief," the character which the law annexes to an answer where the denial of the fraud is on personal knowledge? The allegations of a bill are mere pleadings; the averments in an answer responsive to them are regarded as evidence equivalent to two disinterested witnesses, or one witness and strong corroborative circumstances.

To consider that the denials of an answer on "information and belief" are to be deemed sufficient because the allegations of the pleadings are not sworn to from personal knowledge is simply to confound the distinction which exists between pleadings and evidence. So to modify the rule would exclude any application by the way of information, through its officer, by a government. To every such application an answer on "information and belief" would be sufficient, for personal knowledge of facts is not to be expected from the government. Deeming the rule applicable to this, as it is to all similar cases, the court considered that the denials of the fraud, antedating and forgery were not such as ought to arrest the issue of an injunction; that the case was one of irremediable mischief; and lastly, that the pleadings and exhibits in the case showed a probable foundation to entitle the complainants to be protected against that irreparable mischief, until the determination of the question of title in the tribunal in which it was pending,—this court, without pausing to dwell upon the title set up by defendants, independently of any alleged forgery of it, directed the injunction to issue, but declined for the present the appointment of a receiver.

The injunction exists; the issue of title is still pending in the district court; there is no suggestion of any fact that has arisen since the decision of the court to change the relative attitude of the parties from what it was at that time, nor to alter the jurisdiction of the court in any way over the case. That jurisdiction was distinctly enunciated to be confined to granting the prayer of the bill, the court disclaiming at the same time all power to decide upon title, either on a motion to dissolve an injunction, or on a final hearing.

In this condition of things, an application is made to this court to designate commissioners to take testimony abroad. The facts expected to be proved go mostly to the establishment of the title of the defendants, and the genuineness of the documents by which they propose to sustain that title. The avowed object of invoking that testimony is "to offer it in

evidence on the trial of this case, or on a motion to dissolve the injunction which has been granted against the defendants therein, or for any other purpose in said cause to which such evidence shall be applicable."

The grounds taken in support of this motion are: 1st. That it is matter of right, grantable of course. 2d. That the materiality of the testimony invoked, whether there is to be any hearing at all in the case, whether the testimony would be hereafter admissible, are all matters to be considered when the evidence is offered, not by anticipation. If the first proposition be correct, the second follows as a corollary from it.

The first ground which claims the action of this court as a matter of right, and the granting of the application as matter of course, presupposes the act of the court to be merely ministerial. If this be so, it has no right to investigate whether the testimony be material, or whether it can be used when obtained. All it has to do is to perform the mere ministerial duty which it is commanded to discharge, and the present application is needless. Whence the necessity of naming witnesses, the facts they are expected to prove, and the purpose for which their testimony is invoked, if this motion is grantable as a matter of course? Both these grounds will be discussed together, for each is involved necessarily in the other; for if the granting a "*dedimus potestatem*" is matter of course, the court has nothing to do with the materiality of the testimony, the use to be made of it, or any other matter connected with it. If, on the contrary, the power of this court to grant this application depends upon the materiality of the testimony, and the purposes for which it is invoked, it is evident that neither ground can be tenable.

To sustain the proposition that the granting of the present application is matter of right, reference is made to the sixty-seventh rule governing equity practice, as amended in 1854 by the supreme court of the United States, and to the fifth section of the act of congress of 22d August, 1843.

By the sixty-seventh rule it is provided that, after a cause is at issue, commissions to take testimony may be taken out in vacation, as well as in term time, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice being given to the adverse party to file cross-interrogatories before the issuing of the commission, etc. And the rule provides that, in all cases, the commissioners

shall be named by the court, or a judge thereof. The amendment to this rule, to be found in 17 Howard, p. vii, declares that the presiding judge of any court exercising jurisdiction, either in term time or vacation, may vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge can now do by the sixty-seventh rule.

The presiding judge of this court has never vested in the clerk any such power. We must look, therefore, to the former rule, the construction of which will necessarily determine the extent of any power which the judge could have delegated to the clerk; for the judge could not have delegated any power which he did not himself possess, and which, by the requisitions of the amended rule, was to be exercised by the clerk in the same manner as it could be by the judge. The fifth section of the act of 22d August, 1843 (5 Statutes at Large, 517), provides that the district courts as courts of admiralty, and the circuit courts as courts of equity, shall be deemed always open for certain purposes, and that it will be competent for any judge at chambers, and in vacation as well as in term time, to award all such process, commissions, rules and proceedings, etc., *whenever the same are not grantable of course*, according to the rules and practice of the court. It is evident, then, from the act, that all commissions are not granted of course. Looking through the equity rules, it will be found that a distinction is preserved between special motions and those grantable of course.

What constitutes a motion grantable of course, and a special one, is to be inferred from the fifth rule of equity. The distinction is, that a motion which requires an allowance from the judge, or a notice to the opposite party, is a special one; all others are grantable of course. This motion asks for the interposition of the judge to nominate commissioners, and requires that previous notice of ten days should be given.

In addition to foregoing rules and act of congress, reference has been made to Daniel's Ch. Practice, 1099, where that author discusses the question what facts are necessary to be inserted in the affidavit on which the application for a commission is founded, and shows it is, from the authorities, uncertain whether the names of the witnesses, or a statement of the points to which it is intended to examine them, are necessarily to be given in the *affidavit*. In relation to the names of

witnesses, he states that, according to the books of practice, all that need be stated in the *affidavit* is that the testimony of some of the witnesses whom it is proposed to examine is material, and that the party cannot proceed to trial safely without their testimony. He further states, when the application is made in an early stage of the case, the court seldom denies the application for a commission; it will, however, exercise a discretion upon this subject, and he gives various instances where such applications were refused.

As to the necessity of stating the *facts* to be proved, or the names of the witnesses in the *affidavit*, the conclusion to which he comes, after a review of the authorities, is that, in order to dispense with the necessity of stating them in the *affidavit*, the names of the witnesses, and the object to which their testimony is required, and the necessity for examining witnesses abroad, must be evident from the *pleadings*, if not made so by the *affidavit*; and he distinctly states, that the reason why Lord Eldon, in the case of *Montizibel v. Machada*, did not require those matters to be stated in the affidavit, was, that his lordship had looked into the case, as made by the pleadings, in order to see whether there were facts to which it was proper to examine the witnesses. The same author tells us, that it must appear that the facts relied on as to which evidence is sought are such as can be made use of, either in support of the action or in defense of it. Daniel's Ch. Practice, 1096.

The foregoing authorities (all that have been cited by counsel) do not sustain the proposition asserted. There are but two sources of power to which this court can look for its action to obtain the testimony of absent witnesses. The first is by the issue of letters rogatory. There is no instance on record of these having been issued as a matter of course, nor is the present an application for such. The second source is statutory; nor can this court receive any aid, save by implication, from that source.

The two acts of congress upon this subject are those of 24th September, 1789, and 24th January, 1827. The former, after describing minutely the mode of taking depositions *de bene esse*, limits the execution of commissions to an American magistrate. The latter act (1827) is limited in its terms to the execution of commissions within the limits of the United States and their territories. It would be a strange state of

things, that, without any express legislation as to the mode and manner of issuing commissions, parties would have the right to consider the issue of a commission to take testimony abroad grantable of course, and the nomination of commissioners a mere ministerial act by the judge. The only source of power to which this court can look is the thirtieth section of the judiciary act of 1789 (1 Statutes U. S., 90); and from it derive that power by implication. That section provides "that nothing herein contained shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage when it may be necessary to prevent a failure or delay of justice." This act, like all laws made in derogation of the common law, should be strictly construed.

No commission should be issued under it, unless necessary to prevent a failure or delay of justice, or in accordance with *common usage*. What is meant by common usage, when an application is made to a court of equity for a *dedimus potestatem* to authorize the taking of testimony abroad? It has been contended, on this motion, that by the terms "common usage" in the statute of 1789, congress must have meant the practice of the courts of the states; and the case of *Buddicum v. Kirk*, 3 Cranch, 293, has been cited to sustain this proposition.

It is true that Conkling, in his treatise (p. 421), states that the above case enunciates a proposition which he embodies in these words: "The circumstances under which a commission will be issued, and the mode of obtaining, executing and returning it, in the several districts, depend upon the practice and laws of the respective states, and the rules of the several courts of the United States." If this text-writer intended to say that the rules of chancery, in relation to taking testimony abroad, were to be in accordance with the practice and laws of the different states, he asserts a doctrine totally indefensible. If such was his intention, his ingenuity has detected in that case what has escaped the sagacity of Mr. Justice Curtis; for the latter, in his head-notes (1 Curtis, 584), has failed to perceive, for he does not notice, any such doctrine. The case of *Buddicum v. Kirk* was a common law case, and the question arose whether service of a notice to take a deposition upon an attorney at law was equivalent to one upon an attorney in fact? As the law of Virginia required the notice to be made

on the attorney in fact, the court, very properly, under the thirty-fourth section of the judiciary act, adopted the law of the state in a common law case. That case is no authority to sustain the proposition that the practice of this court, acting as a court of equity, is to be controlled by the practice of the state courts, whatever that may be. It would make the chancery jurisdiction and practice of the federal courts subservient to the practice of the courts of every state in which the federal court might sit; whereas, it must be uniform in all the states. In *Gaines v. Relf*, 15 Pet., 9, this question is fully discussed, and even in Louisiana, where there is no equity state court, it was decided that chancery practice prevails in the circuit court of that state, and must prevail in accordance with the rules prescribed by the supreme court, and where they are silent, according to the practice of the high court of chancery.

The question then arises, whether an application to a court of equity to take testimony abroad is grantable of course, and all considerations of the materiality of the testimony invoked, and the purposes for which it is sought, are to be postponed until the testimony is offered as evidence. Authorities have been cited to sustain the position that a party has a right to move to dissolve an injunction, and even to renew such motion. This is doubtless true; but the right to make any number of such motions does not alter the nature of the evidence proposed to be offered to sustain them, or fix the propriety of granting the application to take testimony abroad. These are to be controlled by the usages and rules of a court of chancery.

The proviso to the thirtieth section of the judiciary act of 1789 (1 Statutes U. S., 90) gives the power to issue a *dedimus potestatem* according to "common usage." When an application for such process is made to a court of equity, that common usage is to be ascertained by reference to the usages of chancery. One of the fundamental principles which controls that court is, that as its object in compelling a discovery, or granting an application for a commission to take testimony abroad, is to enable itself, or some other court, to decide on a matter in dispute between the parties, the discovery or testimony sought must be material to the relief prayed for, or material to be used in some other suit actually instituted or proved to be capable of being instituted in another forum.

If, therefore, the party does not show the testimony he seeks is material to enable him to support or defend a suit, he shows no title to what he seeks; and, consequently, if he seeks it by bill a *demurrer* will lie; if he seeks it by motion, he is not entitled to it. Such is the doctrine enunciated by Lord Redesdale (Mitford's Ch. Pl., 192).

It is illustrated by decided cases. Daniel, in his treatise, cites from the case of *Shedden v. Baring*, 3 Aust., 880, to sustain the proposition that a bill for discovery or a commission to take testimony abroad must not only show that the action has been brought, but it must show that the facts relied on as to which evidence is sought are such as can be made use of, either in support of the action or in defense of it; otherwise, the bill will not lie. In England, the usual mode is to apply by a bill for a discovery and a commission to take testimony abroad, or to take testimony abroad only. "A bill of this kind [says Daniel], for the mere purpose of examining witnesses abroad, is subject to nearly the same rules as bills for discovery in aid of an action at law." Daniel, 1096. There can be no stronger proof that an application to take testimony abroad is not matter of course, but is an application to the judicial discretion, than the fact that the ordinary course in England is to apply by bill in equity to obtain it. In *Lousada v. Templar*, 2 Russ., 561-564, Lord Eldon says, "that though the circumstances were such that, even if the plaintiff at law had obtained a verdict, he could not allow him to receive the money until it was ascertained what had been done in Peru, yet he would not grant commissions in aid of a defense to an action when he was not satisfied that the facts alleged as a defense would constitute a legal defense to the legal demand." The court (he added) "ought never to grant a commission without examining strictly what is the state of the pleadings." It is evident, from this statement of the lord chancellor, that when after his retirement from office he gave an opinion, as stated by Daniel, that the witnesses' names need not be inserted in the *affidavit*, he did not intimate they and the other facts were not necessarily made to appear in the pleadings and by other means.

In the case of *Martin v. Nicholls*, 3 Simons, 458, there is a strong illustration of this doctrine. The principle asserted is that a bill for discovery against a defendant, and a prayer for a commission to take the examination of witnesses, is *demur-*

vable. The facts in the case were that a bill was filed, alleging that a judgment had been obtained against complainant in Antigua, on which an action was pending in England against the complainant. It set forth certain facts to show the foreign judgment was void, prayed a discovery against the defendant, and stated that without proof of such facts the complainant could make no defense at law; it prayed, also, that a commission might issue to take the testimony of witnesses at Antigua and other places beyond the sea. A *demurrer* was filed. The court, after deciding (correctly or not is not the inquiry) that to the foreign judgment the facts, if proved, could not constitute a defense, for that reason sustained the *demurrer*. The chancellor said, "If I were to allow this bill to stand, I should be in effect saying that the judgment obtained in 'Antigua' may be overruled in the court of common pleas." In the language of the chancellor in that case, this court may say that if they allow the present application, so far as the evidence as to title goes, that it is in effect to say it has the right to try title.

Lord Eldon has said, as we have seen in *Lousada v. Templar*, 2 Russ., 561, the court ought never to grant a commission without strictly examining the pleadings. This is for the purpose of ascertaining the issue to be tried by the court, and the materiality of the testimony to try it. When we look at the pleadings in this case, we find the relief prayed for is the issue of an injunction to arrest the destruction of property until an adjudication of it has been made by the tribunals to which it has been confided by law. The whole structure of the bill assumes the ground, and upon it asks the relief prayed, that the district court has sole jurisdiction between the parties on the question of title, and that all the power of this court is limited to granting an injunction, and thus extending a relief not within the sphere of the district court. In the answer a *demurrer* is incorporated, which assigns as one of its grounds, that it appears from the bill itself that no other than the district court can entertain jurisdiction of said claim. It has been contended throughout, by the defendants, that this court could not adjudicate upon title, it being within the sole jurisdiction of the district court, and that circumstance assigned as a reason why this court could not entertain jurisdiction of this bill, which asks for the issue of an injunction. The court, by decreeing the relief prayed for, asserted jurisdic-

tion over the injunction, although it disclaimed all power to decide title. They did so upon the ground that a court of equity would provide for the safety of property in dispute, pending a litigation, and sustained the position by reference to the action of the English chancery in relation to the preservation of property in dispute in the ecclesiastical courts. Now, the pleadings in this case are not changed; the issue is the same; title is no more now in issue in this court than it was; the jurisdiction of this court over this case is in no ways altered, increased, or diminished.

Under these circumstances, application is made to obtain testimony from abroad which relates to the title of defendants, to be used on the trial of this cause, or upon a motion to dissolve the injunction which has been granted. It is the ordinary practice of a court of chancery to dissolve an injunction already issued, after answer filed; and there is no objection to the renewal of such motion upon new and material testimony which would be admissible as evidence on the issue pending between the parties. Indeed, such motion may arise on any new matter which may have arisen since the issuing of the injunction. For instance, the injunction issued in this case has been granted to preserve property, the title of which is pending in another court. This tribunal will watch the conduct of the parties, and continue or dissolve the injunction, as the justice of the case may demand. If the conduct of the complainants be such as to intimate a desire to delay or postpone the trial of the title, this court would, upon motion, dissolve the injunction and dismiss the bill. If, on the other hand, the conduct of the complainant be such as evinces a desire to go to prompt trial of the title, the injunction would be continued until the determination of the title by the courts to which it was confided by law. If that determination be in favor of defendants, a dissolution of the injunction would be decreed, and the bill dismissed. If in favor of complainants, it is unnecessary to prejudge the action of the court. But the result must be, in one event, to decree a perpetual injunction; and in another, to dissolve the injunction, restoring the parties to their former relative position and respective rights, the court having accomplished its object—the preservation of the property pending the dispute. Whether a perpetual injunction be granted or the bill dismissed, the decree will be final on the only issue of which this court has jurisdiction.

Upon the ground, then, that the court has no jurisdiction to try title, and that it would be the assertion on its part of the right to do so if this application were granted; that the evidence as to title cannot be used in this court,—this tribunal, in the exercise of the discretion reposed in it, as controlled by the usages and principles of a court of chancery, is constrained to deny the present motion.

But there is another aspect in which this case must be viewed, and which must also control the discretion of the court. Whatever may be the legal effect of the adjudications of the tribunals to whom the question of title is confided by law, upon the rights of third parties, who have conflicting claims to the property disputed, and who were not parties to the proceedings in those tribunals, there can be little doubt, that, as between the claimants under the act of March 3, 1851 (9 Statutes U. S., 631), and the government of the United States, the provisions of that law cannot be disregarded by this court. By that act, congress prescribed the agencies, manner, and conditions on which the government consented to be sued, and through which, in which, and upon which, they would surrender the legal title which had become vested in them by the treaty of Guadalupe Hidalgo, to such as established a better title, in accordance with the provisions of that law.

By it that body delegated to certain special tribunals the adjudication of title, and limited the manner in which they were enabled to act, taking every precaution by the provisions of the law to guard against fraud and imposture. The power of this court, as one of chancery, to grant injunction, and the application by the United States for such process, gives no additional jurisdiction to this court, nor confers power, beyond that which it has exercised as a court of equity, to preserve the substance of the property. To grant this application would (to use the language of the chancellor in *Nicolls v. Martin*, 3 Simons, 455, as we have seen) be in effect saying, that this court has jurisdiction to try title, and, consequently, to give relief if decided in favor of the defendants.

Was it within the power of congress to pass the act of 3d March, 1851, or is it in conflict with any clause in the constitution of the United States? In the case of *West v. Cochran*, 17 How., 415, the supreme court of the United States enunciate the following principles: "It was also competent for

congress to provide that, before a title should be given to any one, the exact limits of his possession, and the title which the United States was to give, should be defined, and that this should be done by such agencies, and in such manner, as might be fixed by congress. This is in entire accordance with the provisions of the treaty, which guarantees to the inhabitants the rights of property secured to them; but it was not intended to provide for the particular modes and instrumentalities by which such rights should be ascertained and enforced,—these being left to the nation to whose powers they were confided; so that the question is: What has congress deemed expedient?

Now, to ascertain what has been done in this case, we must look to the act of congress passed March 3, 1851 (9 Statutes at Large, 631), entitled "An act to ascertain and settle the private land claims in the state of California."

By it, they have confined exclusively to certain tribunals the adjudication of title, with specially delegated powers, and which, not being courts of general jurisdiction, can exercise none not expressly granted, or directly and necessarily derived by implication. So far from conferring authority upon them to send process to a foreign country to procure testimony, a power exercised by courts of general equity powers, as we have seen, with great caution, congress have excluded a conclusion that any such power can exist, by enacting that "no deposition taken by or in behalf of any such claimant shall be received in any case, whether before the commissioners, or before the district or supreme court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same; and like notice shall be given of the time and place of taking any deposition of the part of the United States." The introduction of this clause into the act is a clear expression of the determination of congress, when they gave their consent that the government should be sued, that her rights were not to be affected by any deposition or testimony in writing, save such as had been taken in the presence of their agent, or of the district attorney of the proper district.

Now, that clause in the law may have been "gross injus-

tice" or "oppression," and a refusal on the part of the present administration to amend the law may be an "iniquitous attempt to suppress the means of truth," as zealously urged by one of the solicitors of those who are making this application. Congress may, however, have been impelled by what they deemed legitimate and prudent precaution to shield the rights of the government from the dangers of testimony taken in a foreign country, among a people who had just ceased to be avowed enemies of this country, without the checks and sanctions thrown around the proceedings by the presence of the agent of this government, and by the execution of the commission before an American functionary. The present administration may have been actuated by the same motives in refusing to amend the said act as has been urged.

The general rule is, however, "that if the motive and design of an act may be traced to an honest and legitimate source, equally as to a corrupt one, the former ought to be preferred." *Arredondo's Case*, 6 Pet., 716. But with the motives of the government which passed the law, or the present administration, which, it is urged, has declined to aid in its repeal, this court has nothing to do. Such legislation, if it be as represented, does not conflict with the constitution of the United States; and the highest tribunal in our country has decided that it is competent for congress to regulate the manner and agencies by which the title of claimants to lands shall be ascertained, and that such legislation does not violate any rights intended to be secured by the treaty. The conclusions to which the court has come are:

1st. That an application for the appointment of commissioners to take testimony abroad is not grantable of course; but it is addressed to the judicial discretion which is controlled by the usages and rules of chancery practice, in accordance with which the present motion cannot be granted.

2d. The act of 3d March, 1851 (9 Statutes, c. 31), cannot be disregarded; and this court ought not to violate the spirit and policy of that act by granting its process to take testimony abroad, to be used in the trial of title in this cause. The motion, therefore, must be denied.

FITCH v. CREIGHTON.

(24 Howard, 159-164. 1860.)

Opinion by Mr. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is an appeal from the circuit

court of the United States for the northern district of Ohio. The bill was filed by Edward Creighton, a citizen of the state of Iowa, against John Fitch, a citizen of the state of Ohio.

By the act of March 11, 1853 (Swan's Statutes Ohio), it is provided "that the city council shall have power to lay off, open, widen, straighten, extend and establish, to improve, keep in order and repair, and to light streets, alleys, public grounds, wharves, landing places and market spaces; to open and construct, and put in order and repair, sewers and drains; to enter upon or take for such of the above purposes as may require it, land and material; and to assess and collect and charge on the owners of any lots or lands, through or by which a street, alley or public highway shall pass, for the purpose of defraying the expenses of constructing, improving and repairing said street, alley or public highway, to be in proportion either to the foot front of the lot or land abutting on such street, alley or highway, or the value of said lot or land as assessed for taxation under the general law of the state, as such municipal corporation may in each case determine."

Each municipal corporation may, either by general or special law or ordinance, prescribe the mode in which the charge on the respective owners of lots or lands shall be assessed and charged to the owner, which shall be enforced by a proceeding at law or in equity, either in the name of the corporation or of any person to whom it shall be directed to be paid, but the judgment or decree was required to be entered severally; and a charge was required to be enforced for the value of the work or material on such lot or land; and where payment shall have been neglected or refused when required, the corporation shall be entitled to recover the amount assessed, and five per cent. from the time of the assessment. Swan's Stat., 963.

On the 7th of April, 1855, the city of Toledo entered into a contract with Creighton, and one Edward Connelly, who bound themselves to do certain work on the streets, for the sums named in the contract; and that so soon as the work was completed, the street commissioner should give them a certificate to the effect, and on the presentation of the same to the council, it would assess the cost and expenses of the improvement on the lots or lands made liable by law to pay the same, and make out and deliver to the contractors a certified

copy of said assessments, and authorize them or assigns to collect the several amounts due and payable for the work and improvement.

Creighton purchased from Connelly his interest in the contract, and went on and performed the work under it, to the acceptance of the city. On the 14th of July, 1856, the council made an assessment on the lots abutting on the improvement in Monroe street, to pay the expenses of that work, and directed that the owners of the lots make payment of the assessments to Creighton. Among the rest, lot 640, belonging to John Fitch, was assessed for this work \$84.56.

On the 20th May, 1856, the council made an assessment upon the lots abutting on said improvement in Michigan street, to pay for the same, and also directed the owners of these lots to make payments of such assessments to Creighton. Among the lots so assessed were the following, owned by defendant, numbered 547, 538, 539, 544, 1,461; the assessments of the respective lots amounted to the sum of \$1,791.76; and subsequently a further assessment was made on the contract of three lots, numbered 686, 751 and 855, which amounted to the sum of \$266.47. The above sums were ordered to be paid to the complainant, with five per centum allowed by law. To this bill the defendant demurred, which, on argument, was overruled. And the court ordered the above sums to be paid in ten days, or in default thereof that the lots be sold, etc.

From this decree an appeal was taken. On the part of the appellant it is claimed that, upon the facts of the case, the circuit court had no jurisdiction; that the equity jurisdiction of the courts of the United States depends upon the principles of general equity, and cannot, therefore, be affected by any local remedy, unless that remedy has been adopted by the courts of the United States.

By the thirty-fourth section of the judiciary act of 1789, it is declared "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." This section does not relate to the practice of our courts, but it constitutes a rule of property on which the courts are bound to act. The courts of the United States have jurisdiction at common law and in chancery, and wherever such jurisdiction may be appropriately exercised,

there being no objection to the citizenship of the parties, the courts of the United States have jurisdiction. This is not derived from the power of the state but from the laws of the United States.

In *Clark v. Smith*, 13 Pet., 203, the court say, "the state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts."

In the case above cited, the legislature of Kentucky authorized a person who was in possession of land claimed by him, and some one else had a claim on the same land; the possessor was authorized to file a bill against the claimant to litigate his title and remove the cloud from it. The statute authorizes a suit at law or in equity, but from the nature of the case it would seem that chancery was the appropriate mode.

There was no necessity to make Connelly a party in this case. He made the contract jointly with Creighton. But before the work was commenced Connelly relinquished his right to Creighton, who performed the whole work, and to whom the city council promised payment. The assessments, too, were made to Creighton, and he was considered the only contractor with the city. No right was held under Connelly. By the statute the city makes an assessment which is to be paid by the owner personally, and it is also made a lien on the property charged. This charge may be collected and the lien enforced by a proceeding at law or in equity, either in the name of the city or its appointee. The claimant is the appointee for this purpose, and his right is too clear to admit of controversy.

This bill is not multifarious; the assessments were assessed on the lots by the foot front, and all against the same defendant. Lord Cottenham, in *Campbell v. Mackay*, 7 Simon, 564, and in *Mylne & Craig*, 603, says, to lay down any rule, applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible. Every case must be governed by its cir-

circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts.

We think the statute of the state, and the municipal corporation of Toledo, authorize the assessment of the sums on the lots in question, and that the judgment in the circuit court must be affirmed.

UNITED STATES *v.* GILLESPIE.

(Circuit Court for New Jersey : 9 Federal Reporter, 74-77. 1881.)

Opinion by NIXON, J.

STATEMENT OF FACTS.—The bill of complaint is filed in this cause against the executors of Joseph L. Lewis, late of Hoboken, in the county of Hudson and state of New Jersey, deceased, and it alleges that the said Lewis departed this life on or about the 4th day of March, 1877, having first duly made and executed his last will and testament, bearing date October 1, 1873, and a codicil thereto, dated June 5, 1875, by which will and codicil, after certain specific bequests, he devised and bequeathed all the residue of his estate as follows :

“I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, and of every kind whatsoever, of which I may die seized and possessed, and to which I may be at my death entitled, unto my executors, in trust, to expend and apply in reducing the national debt of the United States of America, contracted in the course of the rebellion of 1861. In the execution of this trust my executors, as trustees, may use their discretion as to the manner of applying the said residue and remainder of my estate to the reduction of the said debt; but I strictly enjoin them that they personally superintend the application of the said residue and remainder to the purpose aforesaid, that there may be as little waste of it as possible, and that it may not be diverted to other uses by dishonest officials.”

It further alleges: That the executors propounded the will for probate in the prerogative court of New Jersey about the 15th of May, 1877; that the same was admitted to probate,

and letters testamentary granted thereon to the said executors on the 29th of May, 1878; and that they thereupon took on themselves the administration of the estate, and have thereby obtained the possession of and now hold United States bonds and securities, and other property of great value, belonging to the said Lewis at the time of his death.

The bill states various other matters, to which it is not deemed necessary to refer in this connection; and, after alleging that the will has created a trust in favor of the United States which the defendants are legally bound to execute, and that the United States has full right and power to enforce its performance in this court, it prays: That an account of the estate of the testator, and of the receipts and disbursements of the executors, shall be taken and audited, and that the debts, legacies and expenses remaining unpaid shall be duly paid, under the direction of the court, in due course of administration; that the amount of the net residue, applicable to the reduction of the national debt, shall be ascertained and settled; and that the executors shall bring the funds in their hands into the court to abide the administration thereof, and the decree to be rendered therein; and that it may be adjudged and decreed that the said bequest in favor of the United States is valid and operative; and that the defendants be decreed to execute the trust in regard to the residue of the estate; and that the defendants shall answer, state and set forth how they propose to perform and fulfil the trust, after the residue of the estate has been ascertained; and that, if such proposal be satisfactory to the court, the defendants shall be authorized and directed, by the decree of the court, to execute the said trust in the manner so proposed; and that the complainant may have such other and further relief in the premises as the nature of the case may require.

To the bill the defendants have interposed six pleas, supporting the same by an answer. They substantially allege:

(1) That the complainant has made no reasonable demand for the legacy or relief prayed for.

(2) That no suit can be maintained against an executor, in a court of equity, for a legacy, or other such relief as is prayed by the bill, on such allegations as are made in the bill, until a reasonable demand has been made for such legacy or relief, and that no reasonable demand has been made.

(3) That by the statute law of New Jersey no suit at law

can be maintained for a legacy or bequest until after reasonable demand made upon the executor who ought to pay the same; and that no such demand has been made for any part of the relief prayed for, or for any action on the part of the executors, in relation to the discharge of their duties under the will.

(4) That no persons interested in the estate of a testator as legatee or *cestui que trust* can lawfully cite executors to account, alleging only the facts alleged in the bill of complaint, until after a year from the probate; and in case of a suspension of their authority by an appeal from the probate, until one year after the affirmance of the probate; that in the present case the probate was granted May 29, 1880; that it was appealed from by John S. Catheart and others on the 1st of June, 1880, and was affirmed by the court of errors and appeals March 1, 1881; that said appeal suspended all rights and powers of the executors, except such rights and powers as they had before the probate; and that they were unable to sue, or be sued for or in respect of any matter stated in the bill, until they had an unsuspended authority for one year after probate, and that when the bill was filed, to wit, June 7, 1881, they had had an unsuspended authority for only one hundred and two days.

(5) That by the laws of New Jersey an order may be made by the ordinary, or other authority granting probate, that the executors of an estate give notice to creditors of the decedent to bring in their demands against the estate within nine months, on the expiration of which time the court may decree that all creditors who have not brought in their claims shall be barred; that such order was taken in this case March 12, 1881, which was the earliest time that an effectual and undoubted order could be obtained in consequence of the suspension of their authority by the appeal; that until the date of the expiration of said order, to wit, December 12, 1881, it cannot appear that there is any residue of the estate after paying creditors; that many persons have made claim to all, or a large portion, of the testator's assets, under deeds of trust and secret trusts created by testator before his death, not disclosed; and that these claimants to the *corpus* of the estate should be barred before any decree against the executors.

(6) That by statute no action can be brought, either at law or in equity, against the executors within six months after

probate granted, unless upon suggestion of fraud; and that six months has not elapsed from and after probate was granted to them of said will, within the meaning of said statute.

These pleas have been set down for argument under the thirty-third equity rule, and the respective parties have been fully heard. After a careful consideration we are of the opinion that they must be overruled. They seem to have been founded upon a mistaken apprehension of the nature, character and object of the bill of complaint. It is not a suit for legacy or bequest, and hence the several statutes quoted, and the reasons for a stay of proceedings against executors in suits of that sort, have no application. The theory of the bill is that there is an estate in the course of administration in one of the courts of the state of New Jersey which the complainant desires to have administered here; that the defendants are the executors and trustees of the estate, and have the trust fund in their hands, to be disposed of according to the provisions of the will; that the complainant, as *cestui que trust*, is entitled to have the will construed by this court, and to have the directions of the court to the executors and trustees, in regard to the proper method of executing the trust; and, as auxiliary to this, may require an account in order to ascertain what is the residue of the estate available for the purposes of the trust. The general jurisdiction of courts of chancery over questions of this kind, in the administration of estates, is undoubted, and such jurisdiction must be exercised by this court, sitting in equity, when the proper parties appear to invoke it. Entertaining this view it is not necessary to follow the counsel in their learned discussion of questions which are not involved in the subject-matter of the bill of complaint. But, perhaps, we ought to advert to the apprehensions expressed on the argument that the mere allowance of the suit might be construed into a reflection upon the conduct of the defendants. We do not so regard it. We find nothing in the bill suggesting unfaithfulness on their part, and look upon the proceeding as a request by the complainant that the court should aid the trustees in the discharge of their delicate and responsible duties, and should require only the exercise of such reasonable diligence as the condition of the estate and the circumstances of the case demand. With what speed they should be ordered to proceed is under the control of the court, to be determined on the answer, and not on the pleas: and it

ought not to be assumed in advance that the court will make any order which will unreasonably subject the defendant to either hazard, loss or practical inconvenience.

The plea should be overruled, and it is ordered accordingly.

PAYNE *v.* HOOK.

(7 Wallace, 425-433. 1868.)

APPEAL from U. S. Circuit Court, District of Missouri.

STATEMENT OF FACTS.—Ann Payne, a citizen of Virginia, filed a bill in the circuit court of the United States for Missouri, against Zadoc Hook, public administrator of Calloway county, and his sureties on his bond, citizens of Missouri, to obtain her distributive share of the estate of her brother, who died intestate, which was committed to Hook's care by the county court of Calloway county. The bill simply set forth the names of the distributees, and charged the administrator with gross misconduct in managing the estate, and sought to obtain relief and compel a true account of the administration and to be paid what was due her. Hook had not made his final settlement. Defendant demurred, and the court below sustained the demurrer.

Opinion by MR. JUSTICE DAVIS.

The jurisdiction of the circuit court for Missouri to hear this cause is denied, because, in that state, exclusive jurisdiction over all disputes concerning the duties or accounts of administrators until final settlement is given to the local county court, which is the court of probate; and as the administration complained of is still in progress in the county court of Calloway county, resort must be had to that court to correct the errors and frauds in the accounts of the administrator. The theory of the position is this: that a federal court of chancery, sitting in Missouri, will not enforce demands against an administrator or executor, if the court of the state, having general chancery powers, could not enforce similar demands. In other words, as the complainant, were she a citizen of Missouri, could obtain a redress of her grievances only through the local court of probate, she has no better or different rights because she happens to be a citizen of Virginia.

If this position could be maintained, an important part of the jurisdiction conferred on the federal courts by the constitution and laws of congress would be abrogated. As the citizen of one state has the constitutional right to sue a citizen

of another state in the courts of the United States, instead of resorting to a state tribunal, of what value would that right be, if the court in which the suit is instituted could not proceed to judgment and afford a suitable measure of redress? The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results. But this objection to the jurisdiction of the federal tribunals has been heretofore presented to this court and overruled.

We have repeatedly held "that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power." *Hyde v. Stone*, 20 How., 175; *Snydam v. Broadnax*, 14 Pet., 67; *Union Bank v. Jolly*, 18 How., 503. If legal remedies are sometimes modified to suit the changes in the laws of the states and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses; is subject neither to limitation or restraint by state legislation, and is uniform throughout the different states of the Union. *Green v. Creighton*, 23 How., 90; *Robinson v. Campbell*, 3 Wheat., 212; *United States v. Howland*, 4 Wheat., 108; *Pratt v. Northam*, 5 Mason, 95.

The circuit court of the United States for the district of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief. The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case, as disclosed in the pleadings. *Watson v. Sutherland*, 5 Wall., 78.

"It is not enough that there is a remedy at law. It must be plain and adequate; or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce v. Grundy*, 3 Pet., 210.

It is very evident that an action at common law, on the bond of the administrator, would not give to the complainant a practical and efficient remedy for the wrongs which, she says, she has suffered. A proceeding at law is not flexible

enough to reach the fraudulent conduct of the administrator, which is the groundwork of this bill, nor to furnish proper relief against it. It is, however, well settled that a court of chancery, as an incident to its power to enforce trusts, and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands. The bill under review has this object, and nothing more. It seeks to compel the defendant, Hook, to account and pay over to Mrs. Payne her rightful share in the estate of her brother; and in case he should not do it, to fix the liability of the sureties on his bond.

But it is said the proper parties for a decree are not before the court, as the bill shows there are other distributees besides the complainant. It is undoubtedly true that all persons materially interested in the subject-matter of the suit should be made parties to it; but this rule, like all general rules, being founded in convenience, will yield, whenever it is necessary that it should yield, in order to accomplish the ends of justice. It will yield if the court is able to proceed to a decree and do justice to the parties before it without injury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit. Cooper's Eq. Pl., 35.

The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever. *West v. Randall*, 2 Mason, 181; Story's Eq. Pl., § 89 and *sequentia*. The present case affords an ample illustration of this necessity. The complainant sues as one of the next of kin, and names the other distributees, who have the same common interest, without stating of what particular state they are citizens. It is fair to presume, in the absence of any averments to the contrary, that they are citizens of Missouri. If so, they could not be joined as plaintiffs, for that would take away the jurisdiction of the court; and why make them defendants, when the controversy is not with them, but the administrator and his sureties? It can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked. A court of equity adapts its decrees

to the necessities of each case, and should the present suit terminate in a decree against the defendants, it is easy to do substantial justice to all the parties in interest, and prevent a multiplicity of suits, by allowing the other distributees, either through a reference to a master, or by some other proper proceeding, to come in and share in the benefit of the litigation. *West v. Randall*, 2 Mason, 181; *Wood v. Dummer*, 3 Mason, 317; *Story's Eq. Pl., supra*.

The next objection which we have to consider is, that the sureties of the administrator are not proper parties to this suit. Their liability on the bond in an action at law is not denied, but it is insisted they cannot be sued in equity. If this doctrine were to prevail, a court of chancery, in the exercise of its power to compel an administrator to account for the property of his intestate, would be unable to do complete justice, for if, on settlement of the accounts, a balance should be found due the estate, the parties in interest, in case the administrator should fail to pay, would be turned over to a court of law, to renew the litigation with his sureties. A court of equity does not act in this way. It disposes of a case so as to end litigation, not to foster it; to diminish suits, not to multiply them. Having power to determine the liability of the administrator for his misconduct, it necessarily has an equal power, in order to meet the possible exigency of the administrator's inability to satisfy the decree, to settle the amount which the sureties on the bond, in that event, would have to pay.

Besides, it is for the interest of the sureties that they should be joined in the suit with their principal, as it enables them to see that the accounts are correctly settled, and the administrator's liability fixed on a proper basis. If they were not parties, considering the nature and extent of their obligation, they would have just cause of complaint.

It is said the bill is multifarious, but we cannot see any ground for such an objection. A bill cannot be said to be multifarious unless it embraces distinct matters which do not affect all the defendants alike. This case involves but a single matter, and that is the true condition of the estate of Fielding Curtis, which, when ascertained, will determine the rights of the next of kin. In this investigation all the defendants are jointly interested. It is true the bill seeks to open the settlements with the probate court as fraudulent, and to cancel the

receipt and transfer from the complainant to the administrator because obtained by false representation; but the determination of these questions is necessary to arrive at the proper value of the estate, and in their determination the sureties are concerned, for the very object of the bond which they gave was to protect the estate against frauds which the administrator might commit to its prejudice.

The decree of the circuit court for the district of Missouri is reversed, and this cause is remanded to that court with instructions to proceed in conformity with this opinion.

CHAPTER II.

THE BILL, ITS FORM AND REQUISITES.

Rule 20.

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought.

The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of —: A. B., of —, and a citizen of the State of —, —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says that," &c.

Rule 21.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law, and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The

prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for.

Rule 22.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

Rule 43.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, &c.

"2. Whether, &c."

Rule 94.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on

rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

The following provisions relating to equity practice are to be found in the Act of 1st of June, 1872:

SEC. 7. That whenever notice is given of a motion for an injunction out of a circuit or district court of the United States, the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: *Provided*, That no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order except within the circuit to which he is allotted, and in causes pending in the circuit to which he is allotted, or in such causes at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit, or the district judge of the district.

SEC. 13. That when in any suit in equity, commenced in any court in the United States, to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall

be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found; or where such personal service is not practicable, such order shall be published in such manner as the court shall direct; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but such adjudication shall, as regards such absent defendant without appearance, affect his property within such district only.

Rule 23.

The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

Rule 42.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

Rule 91.

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

Rule 24.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

HARRISON v. NIXON.

(9 Peters, 483-540. 1835.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is the case of an appeal from a decree of the circuit court of the district of Pennsylvania in a suit in equity. The bill was filed by Samuel Packer, and asserts that one Matthias Aspden, a citizen of Pennsylvania, made his will, dated in Philadelphia on the 6th of December, 1791; and thereby bequeathed all his estate, real and personal, to his heir at law, and afterwards died in August, 1824; and his will was proved and letters testamentary were taken out in Pennsylvania by the appellee, under which he has received large sums of money; and the bill then asks for a decree in favor of Packer, who asserts himself to be the true and only heir at law of Matthias Aspden, and that he is solely entitled under the bequest. The answer of the executor states, from information and belief, that the testator was born in Philadelphia, which was the residence of his parents, about 1756; that he continued to reside there, doing business as a merchant with some success, before he was twenty-one years of age; that before the breaking out of the war between Great Britain and America in 1776, being still a minor, he went to England, with what view the executor is not, from his own knowledge, able to say, but he believes that he went with an impression that the power of Great Britain must soon prevail in putting down resistance in America; that the testator subsequently came several times to the United States, and in-

vested large sums in government stocks and other securities; but whether after so returning to the United States the testator went back to England as his home, or only for the purpose of superintending his property, and whether the testator did in fact change his domicile, the executor (save and except as appears from the facts) doth not know, and is unable to answer; but he believes that the testator, when in England, considered himself as an alien, etc.; and he died in King street, Holborn, London. The answer also states that the executor proved the will and took out letters testamentary in England; and states certain proceedings had upon a bill in chancery in England by one John Aspden there, claiming to be the heir at law of the testator; and annexes to his answer a copy of the bill. He also alleges that several other persons have made claims to the same property as next of kin of the testator, of whose names, etc., he annexes a schedule.

Various proceedings were had in the circuit court of Pennsylvania, and a reference was made to a master to examine and state who were all the heirs and next of kin of the testator. The master made a report, which was afterwards confirmed, and thereupon a final decree was made by the court in favor of John Aspden, of Lancashire, in England, one of the persons who made claim before the master, as entitled as heir at law to the personal estate in the hands of the executor, and the claims of the other persons claiming as heirs at law were dismissed; and the present appeal has been taken by several of these claimants. The cause having come before this court for argument upon the merits, a question occurred whether the frame of the bill, taken by itself, or taken in connection with the answer, contained sufficient matter upon which the court could proceed to dispose of the merits of the cause and make a final decision.

The bill contains no averment of the actual domicile of the testator at the time of the making of his will, or at the time of his death, or at any intermediate period. Nor does the answer contain any averments of domicile which supply these defects in the bill, even if it could so do, as we are of opinion, in point of law, it could not. Every bill must contain in itself sufficient matters of fact, *per se*, to maintain the case of the plaintiff, so that the same may be put in issue by the answer and established by the proofs. The proofs must be according to the allegations of the parties, and if the proofs

go to matters not within the allegations the court cannot judicially act upon them as a ground for its decision, for the pleadings do not put them in contestation. The *allegata* and the *probata* must reciprocally meet and conform to each other. The case cited at the bar of *Matthew v. Hanbury*, 2 Vern., 187, does not in any manner contradict this doctrine. The proofs there offered were founded upon allegations in the bill, and went directly to overthrow the consideration of the bonds set up in the answer, in opposition to the allegations of the bill, the latter having asserted that the bonds were obtained by threats and undue means, and not for any real debt or other good consideration. Is, then, any averment of the actual domicile of the testator, under the circumstances of the present case, proper and necessary to be made in the bill, in order to enable the court to come to a final decision upon the merits? We think that it is, for the reasons which will be presently stated.

The point was never brought before the circuit court for consideration, and, consequently, was not acted on by that court. It did not attract attention (at least, as far as we know), on either side, in the argument there made, and it was probably passed over (as we all know matters of a similar nature are everywhere else) from the mutual understanding that the merits were to be tried, and without any minute inquiry whether the merits were fully spread upon the record. It is undoubtedly an inconvenience that the mistake has occurred; but we do not see how the court can on this account dispense with what in their judgment the law will otherwise require.

The present is the case of a will, and, so far at least as the matter of the bill is concerned, is exclusively confined to personality bequeathed by that will. And the court are called upon to give a construction to the terms of a will, and in an especial manner to ascertain who is meant by the words "heir at law" in the leading bequest in the will. The language of wills is not of universal interpretation, having the same precise import in all countries and under all circumstances. They are supposed to speak the sense of the testator according to the received laws or usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language which repels or controls such a conclusion. In regard to personality in an especial manner, the

law of the place of the testator's domicile governs in the distribution thereof, and will govern in the interpretation of wills thereof, unless it is manifest that the testator had the laws of some other country in his own view.

No one can doubt if a testator, born and domiciled in England during his whole life, should by his will give his personal estate to his heir at law, that the *descriptio personæ* would have reference to and be governed by the import of the terms in the sense of the laws of England. The import of them might be very different if the testator were born and domiciled in France, in Louisiana, in Pennsylvania or in Massachusetts. In short, a will of personalty speaks according to the laws of the testator's domicile, where there are no other circumstances to control their application; and to raise the question what the testator means, we must first ascertain what was his domicile, and whether he had reference to the laws of that place or to the laws of any foreign country. Now the very gist of the present controversy turns upon the point who were the person or persons intended to be designated by the testator under the appellation of "heir at law." If, at the time of making his will and at his death, he was domiciled in England and had a reference to its laws, the designation might indicate a very different person or persons from what might be the case (we do not say what is the case) if, at the time of making his will and of his death, he was domiciled in Pennsylvania. In order to raise the question of the true interpretation and designation, it seems to us indispensable that the country by whose laws his will is to be interpreted should be first ascertained, and then the inquiry is naturally presented what the provisions of those laws are.

If this be the true posture of the present case, then the bill should allege all the material facts upon which the plaintiff's title depends; and the final judgment of the court must be given so as to put them in contestation in a proper and regular manner. And we do not perceive how the court can dispose of this cause without ascertaining where the testator's domicile was at the time of his making his will and at the time of his death; and if so, then there ought to be suitable averments in the bill to put these matters in issue.

In order to avoid any misconception, it is proper to state that we do not mean in this stage of the cause to express any opinion what would be the effect upon the interpretation of

the will if the domicile of the testator was in one country at the time of his making his will, and in another country at the time of his death. This point may well be left open for future consideration. But being of opinion that an averment of the testator's domicile is indispensable in the bill, we think the case ought to be remanded to the circuit court for the purpose of having suitable amendments made in this particular; and that it will be proper to aver the domicile at the time of making the will and at the time of the death of the testator, and during the intermediate period (if there be any change), so that the elements of a full decision may be finally brought before the court. The petitions of the claimants should contain similar averments.

It appears from the motions which have been made to this court, as well as from certain proceedings in the court below, which have been laid before us in support thereof, that there are certain claimants of this bequest, asserting themselves to be heirs at law, whose claims have not been adjudicated upon in the court below on account of their having been presented at too late a period. As the cause is to go back again for further proceedings, and must be again opened there for new allegations and proofs, these claimants will have a full opportunity of presenting and proving their claims in the cause; and we are of opinion they ought to be let into the cause for this purpose. In drawing up the decree remanding the cause, leave will be given to them accordingly. The decree of the circuit court is therefore reversed, and the cause is remanded to the circuit court for further proceedings in conformity to this opinion.

Mr. JUSTICE BALDWIN dissented.

JONES v. ANDREWS.

(10 Wallace, 327-334. 1870.)

APPEAL from U. S. Circuit Court, Western District of Tennessee.

STATEMENT OF FACTS.—Andrews leased a hotel in Memphis to Reed & Bryson, taking their notes for the rent. These sublet to Jones, taking his notes for the rent. The rent not being paid, Andrews, in the absence of Jones, took possession of the hotel, and recovered judgment in the court below against Reed & Bryson on their notes, and garnished the notes of Jones. Jones then filed a bill in the same court for an

injunction, describing the citizenship of the parties in the caption and in the prayer, averring Andrews to be a citizen of New York and Reed & Bryson to be residents of Tennessee. Andrews was not served with process, but came in and moved that the bill be dismissed for want of jurisdiction and for want of equity.

Opinion by MR. JUSTICE BRADLEY.

On the question of jurisdiction over the parties, the appellees contend: 1st. That the citizenship of the parties was not sufficiently alleged in the bill. 2d. That, if sufficiently alleged, the court had no jurisdiction over Andrews, the principal defendant, who was a citizen of New York, and not a citizen of Tennessee, where the suit was brought.

Although the allegation of citizenship is not made in precise and technical form, we consider it sufficiently explicit to sustain the jurisdiction of the court, if the citizenship disclosed by the allegation does not displace that jurisdiction. It is more explicit than the allegation in the case of *Express Company v. Kountze*, 8 Wall., 342, which was sustained by the court. All that is necessary is, that it fairly appear by the bill of what states the respective parties are citizens. In this case the form of the allegations leaves no room for reasonable doubt.

The other exception, that Andrews, the principal defendant, was not a citizen of the state where the suit was brought, is entitled to more weight. Though the constitution declares that the *judicial power* of the federal government shall extend to controversies between citizens of different states, which would embrace the case before us (the plaintiff being a citizen of Georgia, and Andrews a citizen of New York), yet congress has not established any *court*, except the circuit court, to take cognizance of such cases; and, by the judiciary act of 1789, which establishes that court, congress only invested it with jurisdiction of cases where the suit is between a citizen of the state where the suit is brought, and a citizen of another state (section 11), and moreover declared that no civil suit should be brought before said court against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. The case is certainly not within the purview of this statute. The suit is brought in west Tennessee, and neither Jones, the complainant, nor

Andrews, the defendant, is a citizen of that state. Besides, the suit is brought against Andrews in a district of which he is not an inhabitant, and in which he was not found at the time of serving the writ. Under the act of 1789, and the ruling of the early cases, the court would, *prima facie*, be without jurisdiction. According to those cases the plaintiff, or each of the plaintiffs, if more than one, must be able to sue each of the defendants, if more than one.

But the act of February 28, 1839, by implication, confers jurisdiction over non-residents of the district where the suit is brought, if they voluntarily appear therein. The suit can proceed against them if they voluntarily appear, or without them if they are not necessary parties. If, however, they are necessary parties, and do not voluntarily appear, the difficulty remains the same as before the act of 1839 was passed. *Tobin v. Walkinshaw*, 1 McAL., 26. In this case Andrews *was* a necessary party, and he was not a resident of the district, and was not served with process, but he did voluntarily appear. It is true that as soon as he appeared, he moved a dismissal of the bill on two grounds: (1) That it did not show such facts in regard to the citizenship or residence of the defendants as to give the court jurisdiction. (2) That it contained no equity. Whether, if he had made the motion on the first ground alone, he would have waived his personal exemption, it is not necessary to decide. His moving to dismiss for want of equity was clearly a waiver; and he was properly required to answer the bill. After this the question of jurisdiction over the person was at an end, and the decree of the circuit court, dismissing the bill for want of jurisdiction, must be reversed.

But the case is stronger than this. The jurisdiction of the court did not depend on the residence or citizenship of the parties. The suit is, in its nature, not an original but a defensive or supplementary suit, like a cross-bill, or a bill filed to enjoin a judgment of the same court. The bill is filed for an injunction against the garnishment proceedings under the suit at law for the delivery up of the complainant's notes, and for the establishment of his set-off against Andrews. This is, in substance, its character, and if the facts charged furnish a sufficient ground of equity for the relief asked, as to which the court refrains from expressing any opinion, the complainant had a right to file it against the defendants, and

the court had a right to take cognizance of it as a defensive or supplementary proceeding, growing out of and having direct reference to the proceedings of the defendants in the same court against him. The case, in this respect, as before said, is analogous to that of a cross-bill or bill of review, or a bill for injunction against a judgment at law in the same court, of which the court has jurisdiction irrespective of the residence of the parties. *Logan v. Patrick*, 5 Cranch, 288; *Simms v. Guthrie*, 9 *id.*, 25; *Clarke v. Mathewson*, 12 Pet., 164; *Dunlap v. Stetson*, 4 Mason, 349. As to bills for injunction against judgments at law rendered in the same court, Justice Story, in *Dunlap v. Stetson*, says: "I believe the general, if not universal, practice has been to consider bills of injunction upon judgments in the circuit courts of the United States, not as original, but as auxiliary and dependent suits, and properly sustainable in that court which gave the original judgment, and has it completely under its control. The court itself possesses a power over its own judgments by staying execution thereon; and it would be very inconvenient if it did not possess the means of rendering such further redress as equity and good conscience required."

Let the decree of the circuit court be reversed, and the cause remitted for further proceedings, each party to pay his own costs on this appeal.

Decree accordingly.

DES MOINES & MINNEAPOLIS RAILROAD COMPANY *v.* ALLEY.

(Circuit Court for Iowa : 3 McCrary, 589-591. 1882.)

Opinion by McCRARY, J.

STATEMENT OF FACTS.—This is a suit brought to set aside a deed executed by the complainant to the respondent, John B. Alley, on the 23d of May, 1879, conveying two thousand three hundred and sixty-two acres of land. The amended bill charges that, at the time of said conveyance, the respondent, John B. Alley, was the owner of the majority of the stock of the corporation, and by reason of that ownership exercised a controlling influence over the officers and directors of the complainant corporation, whereby he induced the board of directors and the president of the corporation to consent to the said conveyance, and to execute a deed good and sufficient in form. It is further alleged that the said respondent, John B. Alley, fraudulently procured and caused said conveyance to be

executed. With respect to the consideration paid by the said Alley for said conveyance, there are two allegations in the amended bill as follows: It is first alleged "That, in truth and in fact, the said defendant did not pay anything whatever for said lands; that the books of said company were then under his charge and control, and that he caused to be charged to himself, on account of said lands and said conveyance, the sum of \$4,600, and over against said charge on said book he caused to be credited certain fraudulent entries."

If the allegation stopped here, it would amount to a charge that the conveyance was without any consideration whatever, and would be entirely sufficient. But the bill further avers as follows: "That if, in truth and fact, it shall be made to appear that any portion or all of said \$4,600 was in any manner paid by the said Alley, by just and proper credits, then the said sum or price of said lands was, and is, grossly inadequate to its true value; and the said defendant, by reason of his relationship to the said company plaintiff, and such inadequacy of price, is bound to surrender said lands to the plaintiff. That said lands were then worth, as plaintiff is informed and believes, \$10,000 and more, and have been since then steadily increasing in value; and defendant well knew that said lands were worth much more than the sum of \$4,600, and that they would greatly increase in value from that time forward."

It is necessary that the several allegations of the amended bill should be harmonious and consistent with each other. The amended bill would be sufficient if it distinctly alleged either of three things, to wit: 1. That the conveyance was wholly without consideration; or 2. That it was fraudulent, and there was a consideration, which the complainant has offered to return to the respondent John B. Alley; or 3. That complainant is not informed, and has no means of ascertaining, whether there was a consideration, or what the value of the consideration was, if there was any, and that these facts are peculiarly within the knowledge of the defendant, John B. Alley.

If the case is placed upon the latter ground, then the amended bill should pray a discovery of the facts, and should offer to return any consideration actually paid, to the respondent John B. Alley, as soon as the same is ascertained and determined by the court. It will be seen that it is necessary to amend the bill in order to conform to these suggestions.

The allegation concerning the value of the land should also be made specific. It is not sufficient to state that the complainant believes the land to be worth \$10,000. In these respects, and to this extent, the demurrer is sustained, and the complainant has leave to amend by the February rules, and will serve a copy of his amendment upon the counsel for respondent.

FINLEY v. BANK OF THE UNITED STATES.

(11 Wheaton, 304-308. 1826.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is a bill in chancery, brought by the Bank of the United States against James Finley to obtain a decree for the sale of property mortgaged for the security of a debt due the bank.

The mortgage deed was executed on the 28th of September, 1822, and contains a recital of debts due to the bank to the amount of \$6,240, on account of which a note was executed on that day to the bank for that sum, payable sixty days after date. At the November term of the circuit court of the United States for the district of Kentucky the bill was filed, stating the consent of the mortgagor to an immediate sale of the mortgaged property, although the day of payment was not arrived; and on the same day an answer was filed consenting to a decree for the sale. A decree was immediately entered by consent of parties directing the marshal to sell the property. The court then proceeds to direct the marshal, after deducting the expenses of sale, his commission and the costs, to pay the bank the sum of \$6,240, with interest from the date of the note. The sale was made in pursuance of the decree, and the report thereof was returned to the court by the marshal.

At the succeeding term William Coleman filed his petition, stating, among other things, that he held a prior mortgage on the same lands, and praying that he might be made a party defendant to the suit. His petition was rejected, and he prayed an appeal to this court, which has been dismissed as irregularly granted. After dismissing this petition the circuit court pronounced a decree affirming the sale made by the marshal, and directing the credit to which Finley should be entitled for the money paid out of its proceeds to the bank. This decree also considers the debt due to the bank as amounting to \$6,240, with interest from date of the note.

The mortgage to Coleman is filed, and appears to be dated three days anterior to that made to the bank. A suit to obtain a sale of the premises was instituted in the state court in March, 1823, and was depending when the final decree was pronounced at the suit of the bank. After the final decree had been pronounced, Finley filed a petition praying that the sale and decree might be set aside; alleging, among other reasons therefor, that Coleman, the prior mortgagee, had not been made a party, although the existence of his mortgage was known to the bank.

The prayer of the petition was rejected, and Finley has appealed to this court. The counsel for the plaintiff in error insists that this decree ought to be reversed, because it was pronounced in a case in which proper parties were not before the court.

It cannot be doubted that Coleman ought regularly to have been a party defendant, and that, had the existence of his mortgage been known to the court, no decree ought to have been pronounced in the cause until he was introduced into it. But this fact was kept out of view until the decree was pronounced, the sale made, the money paid to the creditor, and the report of his proceedings returned by the marshal. If the manner in which the sale was made and the money directed to be paid be unusual and exceptionable, it was done by consent, and the error is not imputable to the court.

The only question presented to the judges by this petition was whether a decree, completely executed by a sale of the property and payment of the purchase money, should be set aside and the suit reinstated, for the purpose of introducing a party who ought regularly to have been an original defendant, but who was not shown, by any proceedings in the cause, concerned in interest until the decree was made and executed. There would, certainly, be great inconvenience in such a practice; and, if it be admissible in any case, on which the court gives no opinion, it must be where the mischief resulting from a rejection of the petition would be irremediable. This is not shown to be a case of that description. Coleman's mortgage cannot be affected by this decree. His rights cannot be extinguished by it. His suit in the state court will proceed as if this decree had never been pronounced. The purchasers under the decree of the circuit court take the land subject to prior incumbrances, and have, probably, taken this

incumbrance into consideration in the price given for the land. But, be this as it may, they do not complain or object to their purchase in consequence of the cloud hanging over the title. Coleman's rights cannot be affected; and if Finley has suffered by selling his land subject to a lien, it is an injury which he has knowingly brought upon himself. This is not, then, a case for such an extraordinary measure as opening a decree made by consent, after it has been carried into execution, on the petition of the party who has given that consent. We do not think the decree is erroneous because the prior mortgagee was not made a defendant, that fact not having appeared to the court until the decree was completely executed.

But in the disposition of the money produced by the sale a small mistake appears to have been made. There were some previous debts due from Finley to the bank, amounting to \$6,240, which appear to have been absorbed in the note given for that sum, on the 28th of September, 1822, payable sixty days after date, to secure the payment of which the mortgage deed was executed. If this note carried interest from its date, that fact does not appear, and cannot be presumed. The mortgage deed does not purport to secure the payment of such interest. Yet the decree of the circuit court subjects the mortgaged property to its payment. This error ought to be corrected, and may yet be corrected in the circuit court. It does not affect the sale. In all other respects the decree is to be affirmed.

VOSE *v.* BRONSON.

(6 Wallace, 452-456. 1867.)

APPEAL from U. S. Circuit Court, District of Wisconsin.

STATEMENT OF FACTS.—The La Crosse & Milwaukee Railroad Company issued bonds to the amount of \$4,000,000, and gave a mortgage which was foreclosed. The bonds having been sold at heavy discounts were scaled down, and no more being allowed to the bondholders than the company received for them, a margin remained. Vose, who had sold material to the company and taken bonds at eighty cents on the dollar, with an understanding that if bonds should be sold at a lower rate he should have the benefit of the reduction, intervened by a bill in equity, claiming the benefit of that agreement and to have his demand satisfied out of the margin. The bill was dismissed.

Opinion by MR. JUSTICE DAVIS.

The question presented by this record is of easy solution. If Vose had brought suit against the La Crosse & Milwaukee Railroad Company for a breach of their contract, the interpretation of it would have been a proper subject of inquiry, but the decision of this case does not depend on the disposition of that question. The appellant places his claim for relief on his right to have an outstanding equity with the La Crosse Company adjusted in the foreclosure suit, and his demand attached to the foot of the mortgage. To do this there must be a power somewhere to enlarge the mortgage, and where is it lodged? Certainly not with the trustees, for their duty is to see that the security held by them for their *cestui que trusts* is enforced according to the terms of the deed. They could neither enlarge the mortgage nor consent to its enlargement. The court could not do it, nor the La Crosse Company, as it had covenanted with the trustees, in behalf of the bondholders, that it would only issue \$4,000,000 in bonds. The rights of the bondholders were fixed by the terms of the mortgage. The value of the bonds as an investment depended in a great measure on the number to be issued, and doubtless each purchaser, before he bought, had information of the character of the security on which he relied. The property might be very well a safe security for \$1,000,000, and very unsafe for any additional amount. The doctrine contended for would utterly destroy the marketable value of all corporate securities. No prudent man would ever buy a bond in the market, if the provisions made for its ultimate redemption could be altered without his consent.

But it is said, as the court rendered a decree for less than the face of the bonds, equity will step in and allow the appellant to apply the vacuum of principal secured by the mortgage to liquidate his claim. The answer to this is, that it does not concern the appellant whether the court rightfully or otherwise reduced a portion of the bonds. The bondholders, whose bonds were thus reduced, are the only parties in interest who could have any just cause of complaint against the action of the court, and if they did not feel aggrieved no other person has any right to complain. The security of the mortgage extended to four millions of bonds only, and whatever amount the court should ascertain was due on those four millions was the amount secured, and no more.

If Vose had been made a party defendant to the foreclosure suit, the decree would have been the same. But he was not a necessary party to that suit. The trustees, as the representatives of all the bondholders, acted for him as well as the others. It would be impracticable to make the bondholders parties in a suit to foreclose a railroad mortgage, and there is no rule in equity which requires it to be done.

Decree affirmed.

JACKSON v. ASHTON.

(8 Peters, 148-149. 1834.)

APPEAL from U. S. Circuit Court, District of Pennsylvania.

STATEMENT OF FACTS.—In the caption of the bill in this case the complainants were described as citizens of Virginia, and the defendant as a citizen of Pennsylvania. In the bill it was alleged that the complainants were citizens of Virginia, but the defendant was described as “William E. Ashton, of the city of Philadelphia.”

Opinion by MARSHALL, C. J.

The title or caption of the bill is no part of the bill, and does not remove the objection to the defects in the pleadings. The bill and proceeding should state the citizenship of the parties, to give the court jurisdiction of the case.

The only difficulty which could arise to the dismissal of the bill presents itself upon the statement “that the defendant is of Philadelphia.” This, it might be answered, shows that he is a citizen of Pennsylvania. If this were a new question, the court might decide otherwise; but the decision of the court, in cases which have heretofore been before it, has been express upon the point; and the bill must be dismissed for want of jurisdiction.

WILSON v. GRAHAM.

(Circuit Court for Pennsylvania: 4 Washington, 53-59. 1821.)

STATEMENT OF FACTS.—This was a libel to enforce against Graham a decree rendered in Rhode Island against a box of silk, etc., condemned as prize, which, it was asserted, had come to the hands of Graham. Graham pleaded that he had never been summoned to appear in the Rhode Island court; that he was not a citizen of that state, nor had he been found within it. Plaintiff demurred to this plea. The libel was filed in the district court and appealed from a *pro forma* decree.

Opinion by WASHINGTON, J.

This case turns exclusively upon the question whether the circuit court for the district of Rhode Island had jurisdiction in the case wherein the decree which this libel seeks to enforce was made? If it had, then it is clearly conclusive upon this court, and it must be carried into effect against Graham. If there was a defect of jurisdiction in that case, it is admitted by the appellant's counsel that the decree ought not to be enforced by this court.

In the case *Ex parte Graham* [4 Wash., 211], which terminated in the discharge of the appellee from arrest, under the process of attachment issued by the circuit court of Rhode Island in this very case, the following points were resolved: 1. That the federal circuit and district courts of one state have no authority to issue process into any other state to compel an appearance in those courts, whether in a matter at common law, in equity, or of prize or no prize. 2. That the jurisdiction of those courts, though sitting in prize causes, is limited in point of locality by the bounds of their respective districts, except in a few cases particularly provided by law. 3. That it is essential to the jurisdiction of those courts that the *person* or *thing*, against which the proceedings are directed, should be within their local jurisdiction; except in the latter case, when the thing is considered as being constructively within their jurisdiction: as where it is in possession of the captors, though in a neutral country. 4. That if a prize proceeding be instituted against the *person*, the jurisdiction is excluded, unless it be in a court of the district whereof the person is an inhabitant, or in which he is found at the time of serving the process.

If these principles be correct (and after an attentive reconsideration of them we think they are), it follows that the circuit court of Rhode Island had no original jurisdiction over the person of Peter Graham, because the process of that court could not legally issue into this district, and he *here* served upon him; nor was it served upon him in *that* district: he was not bound to appear and to make himself a party to the suit. Can he, then, be personally bound by a sentence given in a suit in which he was not a party, nor was heard, or could be heard, in his defense? Such a doctrine cannot, we think, be maintained. It is repugnant to the immutable dictates of justice as well as to the express provisions of the eleventh section of the judicial act, which provides "that no

civil suit shall be brought before either of the said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ." For, if the court can exercise jurisdiction in a case and over a person who has not and could not be legally served with its process, the above provision was quite nugatory, and afforded no protection to those for whom it was designed. We have no doubt but that the learned judge who passed that decree, presuming that, in respect to the process, all had been rightfully done (for Graham had no person to represent him in court and to place that matter in its true light), had no reason to question his jurisdiction.

I admit that that court had unquestionable jurisdiction over the box of merchandise alleged to be in the possession of Graham, and as to that or its proceeds the sentence of that court is conclusive, not only as to its correctness, but as to everything which it professes to decide. And this court would not hesitate to execute that decree against the appellee were a proper application made for that purpose, and if it appeared in proof that he had or has the thing or its proceeds in his possession. *As to the thing*, Graham and all other persons claiming an interest in it, either on the ground of property or of possession, were parties to that suit, and were represented in court by the thing which was the subject of the court's jurisdiction, although they were never served with process nor had even heard of the suit. It is upon this ground that the *res* or its proceeds may be followed by the decree of this court into the hands of any person who may have the same in his possession, and who is personally within its jurisdiction. But whether the appellee has, or ever had, in his possession the merchandise mentioned in the decree, or its proceeds, is a fact which this court cannot consider as established by the decree of the circuit court of Rhode Island, inasmuch as the appellee was no party to that suit.

It is contended that the decree against Graham was not founded on original process, but was merely an incident to the original suit, in which the box of merchandise was condemned to the captors. This is not quite correct, since the sentence against Graham was not for the thing condemned or its proceeds, but for a gross sum. But were it otherwise, still the suit against Graham was an original one, in which the ques-

tion to be decided was not whether the goods were legally condemned to the captors, but whether they had come to the hands of the person against whom the suit was prosecuted. And this is the very question which, for the reasons before mentioned, that court was incompetent to decide. At every turn that this case is presented to our view, it is met by the objection that the circuit court of Rhode Island had not cognizance of the matter upon which its sentence was founded.

Again, it is said that, as the libel in this case setting forth the sentence of condemnation, as well as the decree *in personam* against Graham, and the plea, by avoiding the charge of possession, and merely alleging matter in bar of the relief prayed, admits the fact that the appellee was so possessed, there can be no solid reason why the court should not now execute that decree. The conclusion of the counsel is clearly drawn from mistaken premises. The libel sets forth no part of the proceedings of the Rhode Island court but the complaint of Wilson, supported by proof that the box of merchandise imported in the Francis, and condemned as lawful prize to the captors, was delivered by mistake to Stewart, the proceedings against him, the suggestion and proof that the said merchandise, or the proceeds thereof, came to the hands of Graham, and the process against him, followed up by the decree to pay \$2,000 into the registry of that court, and the execution founded thereon returned unsatisfied. The prayer of the libel is *that the said decree against P. Graham may be carried into execution by a decree of this court*. It is manifest, therefore, that, although the sentence of condemnation is mentioned, it is merely by way of recital in the complaint of Wilson against Stewart; that the only decrees set forth in this libel are those against Stewart and Graham; and that the latter is the only one which the libel prays the aid of this court to execute.

Now it is perfectly clear that, according to the practice of the court, where a specific relief is asked for, even although there be a prayer for general relief (which there is not in this case), the court cannot grant a relief which is inconsistent with or entirely different from that which is asked for. Much less can the court, in a case where the libel seeks execution of a decree which is specially set forth, execute a different decree, which is not even stated in the libel as an existing and final decree. If the practice were otherwise, it would be not only

unnecessary to state the relief which is desired, but it would be mischievous to do so, as it could only serve to deceive the other side.

Neither is it correct to say that the plea, by not denying possession of the merchandise, admits it. In the first place, that fact is not charged in the libel, nor is it proved by the decree, for the reasons before mentioned. And even if it were charged, still it must have been upon the conclusive effect of the decree, from which the respondent could, in no other way, have extricated himself but by showing that the court which pronounced it had not jurisdiction in the case. I will not say that the respondent in the district court might not have stated all the matter of the plea in an answer, and also have denied the fact of possession. But then the latter part of his defense would have been merely gratuitous, and not being responsive to the libel in that respect, it could not have availed him. It is, after all, to be remarked that the respondent is never *bound* to reserve to the final hearing any matter which amounts to a bar to the relief prayed, but may by a plea demand the judgment of the court upon such matter, so as to save the expense of a general examination.

The decree of the district court must be affirmed, with costs.

CHAPTER III.

OF THE PARTIES.

Rule 48.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

Rule 49.

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estates, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

Rule 50.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiffs shall

be at liberty to make the heir at law a party where he desires to have the will established against him.

Rule 51.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

Rule 54.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him unless the court shall otherwise direct.

Rule 87.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

TOBIN *v.* WALKINSHAW.

(Circuit Court for California : 1 McAllister, 26-47. 1855.)

Opinion by McALLISTER, J.

STATEMENT OF FACTS.—Among the numerous questions which have been submitted during the argument of this

motion there is one which arrests attention *in limine*, and, in the view I have taken of the case, will preclude a decision on any other. That question is one of jurisdiction. In advance of any discussion on this point I desire to advert to a question which was argued incidentally by the solicitors for the respective parties. I allude to the question, "How far is matter of avoidance in an answer to be treated as evidence by the court?"

An examination of the authorities has conducted me to the conclusion that the rule is that upon the hearing, after the answer is put in issue, new matter set up by way of avoidance must be proved by defendant; but that on a motion for or on a motion to dissolve an injunction such new matter in the answer responsive to the bill is to be deemed evidence in favor of defendant, as his affidavit or sworn statement. As this opinion is necessarily very extended on what I deem the principal point in the decision of this motion, my reasons for the conclusion to which I have come in relation to the question of new matter in the answer will be reserved for some future case or occasion.

In regard to the want of parties in this case, which gives rise to the question of jurisdiction, it has been urged by complainants that it is too late for defendants to object a want of parties, and that this was matter only for a plea in abatement.

Now, a plea for want of parties is not matter for abatement. It is a plea in bar and goes to the whole bill, as well to the discovery as to the relief prayed. 1 Daniell's Ch. Pr., 337. Again, the rule is that if want of parties is apparent on the face of the bill, the defect may be taken advantage of by demurrer. If such defect be vital, it may be insisted on at the hearing, and if the court proceed to a decree, such decree may be reversed. If the defect is not apparent on the bill, it may be propounded by way of a plea, or it may be relied on in a general answer. Story's Eq. Pl., § 236.

In *Van Epps v. Van Deusen*, 4 Paige's Ch., 75, it is said defendant is not bound to demur or plead. He may make the objection in his answer, and may have the same benefit of the objection at the hearing as if it had been taken by plea or demurrer.

The thirty-ninth rule of equity expressly gives the right to defendant to avail in his answer of anything which would

be good in the form of a plea in bar; and the fifty-second rule provides that where defendant by his answer suggests the want of parties, plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection alone. These rules evidently authorize a party to avail himself of a defect for want of parties as effectually in his answer as by plea in bar.

Had defendants availed themselves of the right to plead in bar much time and discussion would have been saved. But they have the right to bring forward their objection in the form of an answer. Having done so, I am called on to decide if there are such parties before the court as will authorize it to adjudicate upon this cause, whether this court be deemed a court of general equity jurisprudence or whether the peculiar structure of the limited jurisdiction of this court under the constitution and laws of the United States be considered.

In *Cameron v. McRoberts*, 3 Wheat., 591, where the citizenship of the other defendants than Cameron did not appear on the record, the supreme court of the United States certified: "If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone."

In *Mallow v. Hinde*, 12 Wheat., 194, the principle is affirmed that, though the rules as to parties in equity are somewhat flexible, yet, where the court can make no decree between the parties before it upon their own rights which are independent of the rights of those not before it, it will not act. The court say: We do not put it "on the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever be their structure as to jurisdiction."

In *Russell v. Clarke's Executors*, 7 Cranch, 98, the court say that merely formal parties might be dispensed with; but where parties are essential to the merits of the question, and may be much affected by the decree, such parties are indispensable. The principle enunciated by the supreme court in the foregoing cases is a reiteration of one universally recognized in equity jurisprudence. Story's Eq. Pl., § 137.

The rule in equity differs from the rule of law, both in the necessity of joining all interested parties in the suit and in the

option of joining them as plaintiffs or defendants. At law a disputed issue is alone contested, the immediate disputants are alone bound by the decision, and they alone are parties to the action. In equity a decree is asked, and not a decision only; and it is therefore requisite that all persons should be before the court whose interests may be affected by the proposed decree or whose concurrence is necessary to a complete arrangement. *Adams' Equity*, 699, 703, 704.

The act of congress of February 28, 1839 (5 Laws U. S., 321), and the forty-seventh equity rule of this court, have been cited by complainant's solicitors and relied on to sustain the jurisdiction in this case. They have also adduced the case of *Doremus and Nixon v. Bennett and others*, 4 McLean, 224, as to the interpretation of the act of congress. That was a case at law. Now it is true that by their provisions the circuit courts of the United States are authorized, in certain cases, to proceed against one or more defendants in the absence of others, where such others are not inhabitants of or found in the district when and where the suit is brought. But both the act of congress and the forty-seventh rule have been elaborately considered and the construction of them fixed by the supreme court of the United States in the recent case of *Shields v. Barrow*, 17 Howard, 130. In that case it is settled that neither the act of congress nor the rule impinges on the general doctrine, and that if the citizenship of parties be such that their joinder would defeat the jurisdiction of the court, such fact will not supersede the necessity of making them parties; so far as the said act and rule apply to suits in equity, it is to be understood they are no more than the legislative affirmance of the rule previously established by the adjudications of the supreme court of the United States. The act of congress removed any difficulty as to jurisdiction between parties who are competent under the general rule of equity jurisprudence; and the forty-seventh rule of practice is only a declaration, for the government of practitioners and courts, of the effect of the act of congress and the previous decisions of the supreme court. "It remains," say the court, "that a circuit court "can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights." 17 Howard, 141.

The general rule as to the parties to a bill is not, then, altered by the act of congress and the equity rule cited by the solicitors for complainants; nor is that rule affected by the limited jurisdiction of the courts of the United States. The fact that a person is without the reach of the process of the court will not dispense with the necessity of making such person a party, provided he be an indispensable one.

Parties to bills are divided into three classes (17 How., 139): 1. Nominal. 2. Necessary. 3. Indispensable. If a nominal party be beyond the reach of the process of the court, being a party having no interest to be affected by the proposed decree, that fact cannot defeat the jurisdiction of the court. An instance of this class of parties is where one is joined as a party for sake of conformity in the bill, having no interest, legal or equitable, to be affected by the decree. The second class, known as necessary parties, are such as have an interest in the controversy, and ought to be made parties to enable the court to do complete justice by adjusting all the rights involved; still, if their interests are separable from those before the court, they are not indispensable parties. Mr. Justice Curtis has referred, as an instance of a necessary party, to the case of *Osborn v. The Bank of the United States*, 9 Wheat., 738. This case has been cited by the solicitors for complainants as the strongest case; and in their written brief upon the point under consideration, they say: "This [case] seems to us conclusive as to the rule in a case of trespass." It is due to the able counsel and the importance of the question that proper consideration be paid to this case. We shall give it that consideration hereafter.

The third class of cases enumerated by Mr. Justice Curtis are the indispensable, who have such an interest in the controversy that a decree cannot be made without affecting that interest; and the inquiry is, Do the pleadings in this case disclose the fact that there are absent persons whose interests make them indispensable parties? The rule we are considering laid down generally is that, where the rights of an absent person will be much affected by the decree asked for, the court cannot proceed to a decree. This general rule is to be applied to the circumstances of each case as they shall arise. By ascertaining how this rule has been applied in precedent cases, we will understand how to apply it to the case at bar.

In *Mallow v. Hinde*, 12 Wheat., 194, the complaint set up

a claim to a tract of land under a survey, No. 537, in the name of John Campbell, who, by his will, devised and bequeathed this, among other muniments of title, to Richard Taylor and others, executors, in trust for the children of his sister. Taylor alone qualified and took upon himself the execution of the trust. He never assigned or conveyed to the *cestui que trusts*, but permitted them to take the management of the claim into their own hands. Subsequently, when these last had arrived at full age, they entered into contracts with one Elias Langham, whereby he became entitled to survey No. 537 and he subsequently conveyed the land to complainants. Thus stood the case when the defendant Hinde, with full knowledge of the rights of complainant, procured from Taylor a military warrant belonging to him (Taylor) in his own right, made an entry thereof in his (Hinde's) right, and, having caused a survey to be made thereupon covering survey No. 537, obtained a patent for the land. Having thus got the legal title he instituted actions of ejectment against the complainants, and obtained judgments of eviction against them. A bill setting forth the whole transaction, charging notice of complainants' rights, and gross fraud against defendant, was filed, which prayed for an injunction to enjoin defendant from proceeding on his judgments, and for general relief. Here was as tortious an act and as great fraud as could be perpetrated under the forms of law, charged upon defendant. The defendant denied all fraud, set up the *bona fides* of the transaction, neither admitted nor denied the contracts between the *cestui que trusts* and Langham, and insisted if there were any such they were fraudulent. Neither Taylor nor the *cestui que trusts* were made parties, being out of the jurisdiction of the court. An objection for want of parties arose, and it was insisted that both Taylor and the *cestui que trusts* were indispensable parties.

The court so decided. They say: "The complainants claim through certain contracts made between Langham and the *cestui que trusts*. How can a court of equity decide that such contracts ought to be decreed specifically without having the parties before them? Such a proceeding would be contrary to all rules which govern a court of equity, and against the principles of natural justice." In respect to Taylor it was urged that he had parted with his "incidental right;" but the court determined that he and the *cestui que trusts* were indis-

pensible parties. "If," says the supreme court, "the United States courts were courts of general jurisdiction, it could not be doubted that the absent persons would be indispensable parties." But it is urged that the rule which prevails in courts of equity generally, that all the parties in interest shall be brought before the court, etc., ought not to be adopted by the courts of the United States, because, from the peculiar structure of their limited jurisdiction over persons, the application of the rule in its full extent would often oust the court of its acknowledged jurisdiction over the persons and subject before it. In answer to such argument the court proceeds to show that no modification of the rule to an extent by which the rights of an absent person may be materially affected is admissible, and concludes by saying: "We put this case on the ground that no court of equity can adjudicate directly upon a person's rights without the party being actually or constructively before the court;" and the bill was found defective for want of parties.

In *Brookes v. Burt*, 1 Beav., 106; 17 Eng. Ch. Rep., 106, a bill was brought by one tenant in common against defendant, who, it was alleged, had wrongfully, and in defiance of complainants' title, entered into possession and received the rents and profits of the property; it was further alleged that complainants had commenced an action of ejectment for the premises, which defendant defended; that before the trial of such ejectment plaintiffs discovered that the property was subject to an outstanding term which was vested in one Mr. Worsley, which defendant threatened to set up to defeat the action at law; and lastly, the bill alleged that James Wavel, the co-tenant in common with plaintiffs, was at the time residing out of the jurisdiction of the court. (It should be observed here that the objection was that the co-tenant in common was not made a party complainant.) There was a general demurrer for want of equity, on the ground that Wavel, the co-tenant, and Worsley, in whom the outstanding term was vested, were indispensable parties to the bill. The court decided that the holder of the outstanding term was not, but that the co-tenant was. On the argument it was urged, in relation to Wavel, that he was part owner of the property; that among other things prayed for was a declaration of right, the delivery of the title deeds of the property, and for an account of the rents and profits, matters in which the

absent party was interested, and that therefore the suit which sought to deal with the inheritance was defective for want of parties. To this complainants replied that the proposition embodied in the objection was that if there be twenty tenants in common, and a stranger gets possession, one of the tenants in common cannot recover the possession of the rents and profits from the stranger without making the other nineteen persons with whom he had no dispute parties to the suit; that this was an ejectment bill and must be governed by the same rules as an ejectment at law; that Wavel, the co-tenant, was out of the jurisdiction of the court. Lastly it was urged that the complainants were entitled to some portion of the relief prayed for, and, at the time of the hearing, they might waive part of the relief sought and obtain the rest; that the demurrer, therefore, covered too much and must be overruled.

Such were the arguments by complainants in that case, and they are similar to those urged in this case by complainants' solicitors. To all the master of the rolls replied: "It appears to me this demurrer must be allowed. . . . Where the demurrer is for want of parties, it is not sufficient for the plaintiffs to say that there is some part of the relief which can be abandoned at the hearing. . . . The bill prays for accounts and the delivery up of title deeds. . . . I conceive Wavel is a necessary party. . . . The demurrer must be allowed." 1 Beavan, 111.

In *Turner v. Hill*, 11 Simons, 1, a bill was filed to compel defendant to transfer her share in a mine to complainant, which it was alleged she had obtained by fraudulent means, and to account for and pay to plaintiff the profits thereof, and that a receiver might be appointed of the profits of the mines. It was objected that the other adventurers in the mine were indispensable parties, inasmuch as an account was called for; and the vice-chancellor decided against the objection on the sole ground that the bill did not call for an account of the mine, but for that of the specific share sued for. He says, "That passage in the prayer of the bill which asks for a receiver of the profits of the whole mines is clearly a mistake, for the plaintiff is seeking, by his bill, to recover no more than a hundredth share of the mines; and therefore, in common fairness of construction, that passage ought to be referred to the profits of that share." Considering such to be the fair construction of the bill, he decided it was unnecessary to make the other shareholders parties.

A similar decision, for the same reasons, was made in the case of *Turner v. Borlase*, 11 Simons, 17, and appeal was carried to the lord chancellor (11 Simons, 18), and the decision in it confirmed, the distinction drawn between a prayer for the profits of the mine and those of the particular share sued for being carefully sustained. In giving his decision on the appeal the chancellor said, "It was, however, observed that the bill prayed a receiver of the profits arising from the said mines; and if that must necessarily be intended to mean the general profits of the mines, it would be asking for that which could not be granted, in the absence of all the other adventurers; but I do not understand the expression to have that meaning. All the case made and all the relief asked relate to the particular shares," etc., "and I must understand the profits as to which the receiver is asked to be the profits spoken of, which makes the whole consistent, and *for which purpose* the other adventurers would not be necessary parties." 11 Simons, 20.

The decision of the court below was therefore affirmed, and the demurrer overruled; but the chancellor, in conclusion, declared that his judgment on the demurrer was on the facts admitted by it; but if the facts at the hearing so admitted were not sustained, the opinion he had just delivered could have no bearing on the case.

The principles deducible from foregoing authorities are :

1. That the general rule in equity is that all persons whose interest may be materially affected by a decree must be before the court to enable it to act.

2. That this rule may be relaxed so as to dispense with formal, and, under special circumstances, with necessary parties.

3. That the rule which has been announced by the decisions of the supreme court of the United States is but a reiteration of the doctrine of a court of equity in the application of its chancery jurisdiction.

4. That the act of congress of February 28, 1839, and the forty-seventh rule of equity, which allow one or more defendants to be sued in the absence of others without the jurisdiction of the court, apply only to competent parties, are simply an affirmation of previous decisions of the supreme court of the United States, and do not vary the rule as to indispensable parties. 17 How., 141.

5. That the peculiar structure of the limited jurisdiction of the courts of the United States does not abolish or modify the rule as to indispensable parties; and the fact that such are without the jurisdiction will not enable the court to proceed against the parties before it.

6. That it has been decided by the supreme court of the United States (12 Wheaton, 194) that where complainant seeks to set aside a fraudulent purchase of land by defendant, and to enjoin his proceeding on a judgment he had obtained in an ejectment at law against complainant, the party through whom the latter claimed his equitable title was an indispensable party.

7. That it has been decided in the English chancery (1 Beavan, 106) that one tenant in common cannot, without joining with him his co-tenant, sustain a bill in equity against the trespasser in possession, and enjoin him from setting up an outstanding term, inasmuch as the bill prayed for the delivery of title deeds and account of the rents, these being matters in which the absent person was interested, and was therefore an indispensable party; that where a question arises as to parties, it is not for the complainant to say the court must proceed to a hearing when he (complainant) may disclaim a part of the relief and obtain the balance; and lastly, that the fact that the absent party resided out of the jurisdiction of the court made no difference in the application of the rule. These last principles are deducible from the case of *Brookes v. Burt*, 1 Beavan, 106. It is to be again noted that this was a case brought by one tenant in common to assert a right against a wrong-doer; and the absent tenant in common was deemed an indispensable party. How much stronger is the case at bar, where it sought to injuriously affect the rights of part owners who are absent! If, in the former case, the person is deemed an indispensable party, *a fortiori* he must be so deemed in the latter.

8. That it has been decided that where a bill is filed to compel defendant to transfer to complainant a share in a mine fraudulently obtained by him, and to account for the profits thereof, jurisdiction will be sustained on the ground that the bill seeks only a specific share in the profits thereof; but it is expressly affirmed that if the bill had sought for a delivery of title papers, which touches the inheritance, or for an account of the mines, these being matters in which the other adven-

turers in the mine were interested, the court could not proceed, such other adventurers being indispensable parties.

Let us apply these principles to the case at bar. The complainants in their bill allege title to certain premises situated in this state; that defendants have wrongfully entered into possession thereof, and are committing a trespass thereon by cutting down timber and excavating mines or minerals therefrom, and that they (the complainants) have instituted an action of ejectment against the defendants for the purpose of evicting them therefrom. The bill prays against defendants:

1. That an account be taken for the year preceding the filing of the bill of the amount of timber cut and destroyed on the premises, and a similar account of the quicksilver so taken.

2. That injunction may issue to restrain defendants from further trespass.

3. That a receiver be appointed to take charge of the mine and the reducing establishment connected therewith, and all the products thereof, now within the jurisdiction of this court.

4. That on the final hearing the conveyances made, under which defendants claim title, may be ordered to be delivered up and canceled, the injunction made perpetual, and for general relief.

An answer has been filed, and the facts necessary to be looked to in connection to the question as to parties are found in pages 43, 44 and 45. The facts disclosed are that there are proprietors of the mine and land other than defendants. That of them, four in number, viz., Eustaquio Barron, Eustachio M. Barron, Martin La Piedra and Maria Oritz, are without the jurisdiction of this court; that John Parrott and James R. Bolton are also co-owners of the premises, and that they are within the reach of the process of the court. It is further averred that long before the institution of the action of ejectment at law, and before the exhibiting of the bill, a contract was entered into by the owners of the mine with certain persons for the working of them; and it is contended that both the proprietors and contractors should be made parties.

Upon the authority of the cases cited above I cannot doubt that the owners are indispensable parties in this case. In the opinion of the court the authority of cases is hardly needed.

What is the character of this bill? It does not seek the

interposition of this court to recover the specific shares of the mine or land and the profits thereof, property of the defendants. If it did it would come within the authorities and the limits of natural justice. But the bill asks that an account of profits belonging to other people, and title deeds to property in which those other and absent persons are as much interested and to a larger extent than the defendants themselves, shall be canceled. It further asks that the profits of all the owners should be wrested from them and paid into the hands of a receiver. Now, can this court call for an account of the profits of the mine or arrest such profits, or direct a cancellation and delivery of the title deeds, in the absence of parties both within and without the reach of its process who are interested in those profits and those title deeds? Were the court to do any one of these things would not the rights of the absent owners be materially affected? It is urged that the court can entertain jurisdiction of this case, issue the injunction and wait until the hearing, when the complainant may waive a portion of the relief prayed for, and the court can decree so much of that relief as they may be entitled to. This course would be contrary to authority, and in violation of the reason of the thing. We have seen that the lord chancellor has said in *Brookes v. Burt* that when the question of parties arises it is not sufficient for the complainant to say "that there is some part of the relief which can be abandoned at the hearing." Again, apart from authority, on what ground of justice or reason can this court arrest, by injunction, the profits of the mine from absent persons until the hearing, for the purpose of ultimately getting an account from the defendants of their specific interests? Would the arrest of these profits "affect" the interest of the absent owners? If so, should a court of equity proceed in their absence? "*Audi alteram partem*" is alike a dictate of natural justice and a precept of municipal law.

I have searched in vain for a precedent that would justify this course. The able counsel for complainants would have found such if any existed. The case of *Osborn v. The Bank of the United States* has been adduced as the authority which seems to them conclusive in favor of such jurisdiction; and it has been intimated to me by one of the counsel that it has been exhibited to several of his professional brethren, who concur in the opinion that it is conclusive on the point. That case, therefore, claims attention.

The opinion in that case occupies seventy-six pages of the Reporter. To show what were the points decided, by traveling through it, would be time misspent. But there is a short method of doing this, and one, perhaps, which will conduct to a more correct conclusion than any this court could pursue. By reference to the prospectus, published by Mr. Justice Curtis in 17 Howard, it will be found that his plan in giving his new edition of the Supreme Court Reports was to endeavor to give, in the head-notes, the substance of each decision. They are designed, he says, to show the points decided by the court, not the *dicta* or reasonings of the court. Now, upon reference to his headnotes to *Osborn v. The Bank of the United States*, we find that the only points which, in his opinion, were decided in that case which touch the question under consideration are: 1. A court of equity may restrain, by injunction, a public officer of a state from acting under a void law of a state to destroy a franchise. 2. As the state cannot be joined as a defendant, its agent may be sued alone; and if he has specific moneys or notes wrongfully taken in his possession, they may be ordered to be returned.

So far as any decision in this case goes, it does not touch the case at bar. But reference has been had to certain observations made by Chief Justice Marshall, while delivering the opinion of the court, and citations from the opinion have been inserted in the brief of solicitors for complainants, which are deemed directly applicable to the case at bar. The first citation is from 9 Wheaton, page 842, and is as follows: "The single act of levying the tax in the first instance is the cause of an action at law: but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents the repetition and protects the privilege. The same conservative principle which induces the court to interpose its authority for the protection of exclusive privileges, to prevent the commission of waste, even in some cases of trespass, and many cases of destruction, will, we think, apply in this. Indeed, trespass is destruction where there is no privity of estate. If the state of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be maintained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless

all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedy against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit. It is admitted that the privilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connection with his principal, that he is responsible for his own act to the full extent of the injury, why should not the preventive power of the court also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for committing?"

The propositions asserted in the above observations are:

1. That though the single act of an illegal tax is the subject of an action at law, its repetition makes it a continuing trespass, which a court of equity may enjoin.

2. That where the principle is exempt from all judicial process, being a sovereign state, the privilege which belongs to such principal is not communicated to the agent who does the wrong.

3. That under such circumstances the court, acting on the principle, "*Lex non cogit ad impossibilia*," will, at instance of complainant, issue an injunction to restrain the agent from committing the tortious act.

These propositions cannot control this case:

1. Because there is no question of principal and agent in this case.

2. The necessity of dispensing with a necessary party who was exempt from judicial process does not exist in this case. (On page 846, C. J. Marshall says, "Had it been in the power of complainant to make it [the state] a party, perhaps no decree ought to have been pronounced.")

3. Because the attempt in this case is to make defendants liable as principals in a tort, and asks the court to arrest the

profits of absent parties for the purpose of making defendants responsible for the consequences of their own tortious act.

There are two other citations from the opinions of the court. The first is a continuation of the first above quoted and is in these words: "We put out of view the character of the principal as a sovereign state, because that is made a distinct point, and consider the question singly as respects the want of parties." Here this second citation ceases, and another is taken from the succeeding page (844), as follows: "In the regular course of things the agent would pay over the money immediately to his principal, and would thus place it beyond the reach of the injured party, since his principal is not amenable to the law. The remedy for the injury would be against the agent only, and what agent could make compensation for such an injury? The remedy would have nothing real in it. It would be a remedy in name only, not in substance. This alone would, in our opinion, be a sufficient reason for a court of equity. The injury would in fact be irreparable; and the cases are innumerable in which injunctions are awarded on this ground." Now, this latter citation establishes this proposition, viz.: That the agent would pay over to the principal, who was exempt from all judicial process, and, being unable to respond to the damages, the injury would be irreparable, and therefore is ground for injunction. To this extent it goes; but the whole is dependent for its application upon the fact whether defendant is responsible upon an implied contract solely for the amount in his hands. This is evident, as the court puts the hypothesis. "Now, *if* the party before the court would be responsible for the whole injury," etc.

To prove why the court considers the defendant liable, it is necessary to cite the remarks which intervene between the two quotations cited above: "Now, *if* the party," say the court, "would be responsible for the whole injury, why may he not be restrained, etc. The appellants found their distinction on the legal principle that all trespasses are several as well as joint, without inquiring into the validity of this reason, if it be true. We ask if it be true? Will it be said that the action of trespass is the only remedy given for this injury? Can it be denied that an action on the case for money had and received to the plaintiff's use might be maintained? We think it cannot; and if such an action might be maintained,

no plausible reason suggests itself to us for the opinion that an injunction may not be awarded to restrain the agent with as much propriety as it might be awarded to restrain the principal, could the principal be made a party." It was on the ground, then, that the equitable action for money had and received could be maintained against the agent—for money in his hands and received by him in legal consideration to the use of plaintiff—that C. J. Marshall uses the observations quoted to sustain the proposition that injunction might issue to restrain the payment over by the agent to his principal. Can this apply to the case at bar? No one pretends that such action could lie against defendants in this case. Independently of all other views, there is one which covers this whole case and precludes the idea that it can control the one at bar. It has been shown that the absent parties are indispensable in this case. Such was not the fact in the case relied on. The state of Ohio was but a necessary party, and there was a discretion in the court to dispense with such party. True, the interest of the state, in *quantity*, extended to the whole amount in controversy; but what was the *nature* of that interest? It was not a vested nor an equitable interest. It was never in the possession of the absent party, nor had the state an equitable right to it, for the court never could recognize the possession of a fund, or an equitable right to possession in the principal, where that fund has been raised *in fraudem legis* by the agent. The object of the bill was to arrest the fund in its transit from the agent to the principal. Hence the nature of the interest held by the state was, to use the language of Mr. Clay in his argument, "a collateral and contingent interest," which will not make a party who must be joined. Hence, again, Mr. Justice Curtis, in 1855, in the case of *Shields v. Barrow*, 17 How., 130, in his classification of parties, enumerates several instances of the different kinds of parties, excluding the case of *Osborn v. The Bank of the United States* from the class of indispensable and including it among that of necessary parties, which latter, as we have seen, may, under peculiar circumstances, be dispensed with.

It is by attention to the distinction between necessary and indispensable parties that the numerous decisions of the courts, made in the application of the general rule, may be harmonized.

Cases have been referred to in which persons who are with-

out the reach of the process of the court have been dispensed with ; but in all such it will be found that the absent persons were either formal or necessary parties, but not deemed indispensable.

In this case I am satisfied that the owners of the mines are parties whose interests must necessarily be affected by any decree which can be made in conformity with the prayer of this bill. Cases are also cited to show that the courts of the United States will consider the rule as to parties flexible where the absent persons who should be made parties are out of the reach of the process of the court ; but in each of them it will be found that the utmost extent to which a relaxation has been carried has been to dispense with a necessary party only. But there is one feature in this case which distinguishes it from all others. It is that two of the absent persons whose interest would be affected by a decree are residents of this city and within the reach of the process of this court. The only reason for their omission as parties is the fact that their introduction would oust the jurisdiction of this court. But if bringing them before the court this case would be beyond its jurisdiction, can the court by indirection adjudicate upon their rights and thus do indirectly what it could not, rightfully, directly do? I think not.

The present motion is therefore denied, and it is ordered accordingly.

MORGAN v. MORGAN.

(2 Wheaton. 290-302. 1817.)

APPEAL from U. S. Circuit Court, District of Kentucky.

Opinion by MARSHALL, C. J.

In this case two questions respecting the formal proceedings of the circuit court have been made by the counsel for the appellant. The first is, that one of the complainants in the original suit having settled in the state of Kentucky after this bill was filed, that court could no longer entertain jurisdiction of the cause and ought to have dismissed the bill.

We are all of opinion that the jurisdiction having once vested was not divested by the change of residence of either of the parties.

2d. It appearing from the will that at its date the testator had a child who is not a party in this suit, the bill ought to be dismissed, or the decree opened and the cause sent back to

make proper parties. It is unquestionable that all the co-heirs of the deceased ought to be parties to this suit, either plaintiff or defendant; and a specific performance ought not to be decreed until they shall be all before the court. It would, perhaps, be not enough to say that the child named in the will and not made a party is most probably dead. In such a case as this, the fact of his death ought to be proved, not presumed. But as the opinion of the court on the merits of the cause will render it unnecessary to decide this question, it is thought best for the interest of all parties to proceed to the consideration of another point which will finally terminate the contest, so far as it is to be determined in a court of equity.

[NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

ELMENDORF *v.* TAYLOR.

(10 Wheaton, 152-177. 1825.)

APPEAL from U. S. Circuit Court, District of Kentucky.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This suit was brought by the appellant, Elmendorf, in the court for the seventh circuit and district of Kentucky, to obtain a conveyance of lands held by the defendants under a prior grant, and under entries which are also older than the entry of the plaintiff. As the defendants do not adduce their entries, and rely entirely on their patent, the case depends on the validity of the plaintiff's entry. That was made in April, 1784, and was afterwards, in July of the same year, explained, or amended, so as to read as follows: "Walker Daniel enters eight thousand acres, beginning at the most southwestwardly corner of Duncan Rose's survey of eight thousand acres between Floyd's Fork and Bull Skin; thence along his westwardly line to the corner; thence the same course with James Kemp's line, north two degrees west, nine hundred and sixty-four poles to a survey of John Lewis for twenty-two thousand acres; thence with Lewis' line, and from the beginning south seven degrees west, till a line parallel with the first line will include the quantity."

As this entry begins at "the most southwestwardly corner of Duncan Rose's survey of eight thousand acres between Floyd's Fork and Bull Skin," the first inquiry is, whether this survey was at the time an object of sufficient notoriety to

give validity to an entry calling for one of its corners as a beginning. It is not pretended that the survey itself had acquired this notoriety; but the plaintiff contends that it had become a matter of record, and that subsequent purchasers were, on that account, bound to know its position, in like manner as they are bound to know the position of entries. The land law prescribes that surveys shall be returned to the office, and recorded in a record book, to be kept for that purpose by the principal surveyor, within three months from the time of their being made. They are to be returned to the land office in twelve months from their date, during which time the surveyor is forbidden to give a copy to any person other than the owner.

It is contended by the defendants that this prohibition to give a copy of the plot and certificate of survey excludes the idea of that notoriety which is ascribed to a record. Though inserted for preservation in a book which is denominated a book of record, it does not become, in fact, a record until it shall partake of that characteristic quality of a record, on which the obligation to notice it is founded, being accessible to all the world. Were even an inspection of the book demandable as a matter of right, which the defendants deny, that inspection would, they say, from the nature of the thing, be of no avail, unless a copy was also attainable. They insist, therefore, that the notoriety of these surveys is not to be implied from the fact that the three months had expired during which they were directed by law to be recorded.

The plaintiff contends that the book of surveys has every characteristic of a record except that the surveyor is restrained from granting copies until the time limited by law for the return of surveys to the land office shall have expired, and denies that the notoriety attached to a record is dependent entirely on the right to demand a copy of it. He maintains the right to inspect it, and insists that this right has been considered by the legislature as giving sufficient notice to all persons interested in the property to enter a caveat against the issuing of a patent, from which he implies that it is intended as a record to give notice, although a copy of it cannot be obtained. Were this question now for the first time to be decided, a considerable contrariety of opinion respecting it would prevail in the court; but it will be unnecessary to discuss it, if the point shall appear to be settled in Kentucky.

This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe which professed to be governed by principle would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the constitution, laws or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled.

2. It is contended that he is a tenant in common with others, and ought not to be permitted to sue in equity, without making his co-tenants parties to the suit.

This objection does not affect the jurisdiction, but addresses itself to the policy of the court. Courts of equity require that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the court itself, and is subject to its discretion. It is not, like the description of parties, an inflexible rule, a failure to observe which turns the party out of court, because it has no jurisdiction over his cause; but, being introduced by the court itself, for the purposes of justice, is susceptible of modification for the promotion of those purposes. In this case the persons who are alleged to be tenants in common with the plaintiffs, appear to be entitled to a fourth part, not of the whole tract, but of a specially described portion of it, which may or may not interfere with the part occupied by the defendants. Neither the bill nor

answers allege such an interference, and the court ought not, without such allegation, to presume it. Had the decree of the circuit court been in favor of the plaintiff, and had this objection to it been deemed sufficient to induce this court to reverse it, and send back the case for the examination of this fact, it could never have justified a dismissal of the bill without allowing the plaintiff an opportunity of showing that he was the sole owner of the lands in dispute. In addition to these observations, it may be proper to say that the rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the courts of the United States, is not applicable to all. In the exercise of its discretion, the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But, if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such party be a resident of some other state ought not to prevent a decree upon its merits. It would be a misapplication of the rule to dismiss the plaintiff's bill because he has not done that which the law will not enable him to do.

[NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

GRAY *v.* LARRIMORE.

(Circuit Court for California: 4 Sawyer, 638-653; 2 Abbott, 542. 1867.)

STATEMENT OF FACTS.—Action to recover certain real estate in the city of San Francisco. Both parties claimed under Franklin C. Gray; the plaintiffs, as his widow and infant child; the defendants as the purchasers under a judicial sale made by order of a district court of the state of California in a case in which W. H. Gray, who claimed to be a partner of F. C. Gray, was the plaintiff, and the administrators of F. C. Gray and his widow and child were defendants. The widow and child being non-residents, process by publication was resorted to to bring them before the court.

After this suit was instituted another like suit was instituted by C. G. Eaton, who also claimed to be a partner with F. C. Gray. The suits were consolidated, and the decree ordering a sale was made in the conjoint suit. The chief question raised by the pleadings and testimony was whether the decree

obtained in that suit was binding upon the non-resident widow and infant.

Opinion by FIELD, J.

It is a familiar doctrine that the jurisdiction of any court over either the person of the defendant or of the subject-matter may be inquired into whenever any right or benefit is claimed under its proceedings. The want of jurisdiction will render its judgments and decrees unavailable for any purpose. *Borden v. Fitch*, 15 John., 140; *Williamson v. Berry*, 8 How., 541. The doctrine is as applicable to the proceedings of courts of superior or general authority as it is to courts of inferior or limited authority. The difference between these courts in this respect relates only to the presumptions raised by the law. With reference to courts of superior or general authority jurisdiction is presumed until the contrary appears; but with reference to courts of inferior or limited authority, the jurisdiction must be affirmatively shown by parties who claim any right or benefit under their proceedings. *Mills v. Martin*, 19 John., 33; *Bloom v. Burdick*, 1 Hill, 140.

The general presumption indulged in support of the judgments and decrees of the superior courts is, however, limited to jurisdiction over persons within their territorial limits; persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law. Whenever it appears, either from inspection of the record or by evidence outside the record, that the defendants were at the time of the alleged service upon them beyond the reach of the process of the court, the presumption ceases, and the burden of establishing the jurisdiction over them is thrown upon the party who invokes the benefit or protection of its judgments and decrees. So, too, the presumption ceases when the proceedings are not in accordance with the course of the common law. With reference to such proceedings the superior courts, though in other respects possessing general authority, exercise only a limited and special jurisdiction.

In the bills of complaint in the two actions of Gray and Eaton, the absence of the infant Franklina from California and her residence in another state are alleged. The presumption of jurisdiction over her person by the district court is thereby repelled, and it remains for the defendants to show that by means provided by the statute in such cases the jurisdiction was acquired. The statutes substitute, in cases of a

non-resident and absent defendant, constructive service, by publication of the summons, in place of personal service; and it designates the facts which must appear to authorize an order for the publication, the period for which the publication must be made, and the manner in which such publication must be proved. The statute is in derogation of the common law, and its provisions must be strictly pursued. A failure to comply with any of the particulars stated will be fatal unless cured by the voluntary appearance of the party.

The doctrine of equity, when some of the parties are out of the jurisdiction of the court, is well stated by Mr. Justice Story in his *Equity Pleadings*, secs. 81, 82 and 83. After commenting upon the general rule that all persons legally or beneficially interested in the subject-matter of a suit in equity should be made parties, and stating an exception with reference to persons without the jurisdiction, who cannot consequently be reached by the process of the court, the learned justice says: "It is an important qualification ingrafted on this particular exception that persons who are out of the jurisdiction, and are ordinarily proper and necessary parties, can be dispensed with only when their interests will not be prejudiced by the decree, and when they are not indispensable to the just ascertainment of the merits of the case before the court. The doctrine ordinarily laid down on this point is that when the persons who are out of the jurisdiction are merely passive objects of the judgment of the court, or their rights are merely incidental to those of the parties before the court, then, inasmuch as a complete decree may be obtained without them, they may be dispensed with. But if such absent persons are to be active in the performance or execution of the decree, or if they have rights wholly distinct from those of the other parties, or if the decree ought to be pursued against them, then the court cannot properly proceed to a determination of the whole cause without their being made parties. And under such circumstances, their being out of the jurisdiction constitutes no ground for proceeding to any decree against them or their rights or interests; but the suit, so far at least as their rights and interests are concerned, should be stayed; for to this extent it is unavoidably defective. In many instances the objection will be fatal to the whole suit."

The case of a bill brought by one partner against several other copartners, one of whom was out of the jurisdiction,

praying for an account and dissolution of the copartnership, is given by Story in illustration of this last position, that the objection will sometimes be fatal to the whole suit, for "the absent partner," says the justice, "would have a distinct and independent interest, and would seem to be an indispensable party, since the decree must affect that interest, and, indeed, would pervade the entire operations of the partnership." The case of *Browne v. Blount*, 2 Russ. & Mylne, 83, is also referred to as illustrating the same position. In that case a judgment creditor of one Blount had sued out a writ of *elegit* upon his judgment, and had filed his bill to reach certain real estates which were vested in trustees upon certain trusts, under which Blount was entitled to the rents and profits during his life. The trustees and certain parties interested under the trusts, and others having a charge upon the trust estates, were made parties, but Blount was abroad, and had been for years previous to the institution of the suit, and was not, therefore, made a party. The court held that "Blount being the person whose interests were sought to be affected by the decree, the suit could not proceed in his absence." See in further illustration of the doctrine stated: *Midford's Chan. Pl.*, 31, 32; *Inchiquin v. French*, 1 Ambler, 33; *Fell v. Brown*, 2 Brown's Chan. Cas., 276; *Beaumont v. Meredith*, 3 Ves. & Beames, 180; *Evans v. Stokes*, 1 Keen, 32; *Russell v. Clark's Executors*, 7 Cranch, 98; *Mallow v. Hinde*, 12 Wheat., 194; *Fuller v. Benjamin*, 23 Me., 255; *Sparr v. Scoville*, 3 Cush., 578.

In *Evans v. Stokes* the bill was filed to have the affairs of a joint-stock company, which was a co-partnership, wound up and settled under the decree of the court, and accounts of the partnership taken, and a sale of some portion of the property made by the directors set aside, and it was held that all the members of the company, however numerous, must be made parties. "It is perfectly obvious," said the master of the rolls, "that a suit, where all the accounts of the partnership are to be taken, and the rights of all the parties are to be determined, as between themselves, and under the various circumstances in which they stand in relation to each other, some of them, for instance, having paid their calls, and others having omitted to do so, cannot be prosecuted in the absence of any of those parties."

The case of *Fuller v. Benjamin* is equally pointed. In that case four persons had been co-partners, two of whom had be-

come insolvent, and were out of the state; the suit was brought by one of the partners against the solvent member. On demurrer for want of parties the court said: "In cases of partnership it must be difficult, if not impracticable, to proceed in equity without the presence of all the co-partners or their legal representatives. Each must be expected to have claims, either for services rendered or advances made, without the adjustment of which it will be impossible to ascertain what may be due from or to the joint concern by each; or what just claim any one or more of them may have against any one or more of the others. Until such an ascertainment shall have been made it will be impossible to pass a decree, which shall be founded upon the principles of justice, as to their several rights." And again: "The plaintiff in this case would seem to be without remedy, either at law or in equity. In Story on Equity Pleadings, sections 82, 83, 152 and 218, it is clearly shown that a court of equity cannot take cognizance of a case in the predicament of the one here exhibited. Although the partners not present are insolvent, yet are they indispensable parties whose rights might be affected by a decree, and who must be present to be able to afford information as to their own claims in connection with those of the others, and if bankrupts, their assignees should be made parties."

The condition of the alleged co-partners, Gray and Eaton, might have been similar to that of the plaintiff in this last case—without relief either at law or in equity—had there not been a provision in the legislation of the state for securing service by publication upon the non-resident infant. As they did not pursue the course pointed out by the statute, their present position with reference to the subsequent proceedings, and the decree rendered, is precisely what it would have been if no such statute had existed.

The principle upon which the several cases cited proceed is fundamental, and underlies the administration of justice in all courts of equity.

The conclusion which we have reached renders it unnecessary to pass upon the objection taken to the introduction of the decree of April 7, 1856. The decree has never been produced upon any previous trial of the actions brought by the widow and child; it is not embraced in the judgment roll of the consolidated action of Gray & Eaton; it did not form any

portion of the record which was presented in that action to the supreme court of the state, or of the record in the recent action of ejectment of Gray against Brignardello, before the supreme court of the United States. For nearly nine years the original document, signed by the district judge, has lain unknown in the desk of the commissioner in this city. It appears, also, that subsequently, on the 14th of May, 1856, the decree was amended for some alleged want of conformity to the previous report of the commissioner, and that a new decree was substituted in its place. It may well be doubted whether, under these circumstances, the decree should have been received in evidence; but, as stated, the question of its admissibility is rendered immaterial from the conclusions reached on other grounds.

The tax deeds produced by the defendant Larrimore do not aid the defense. He was in possession of the premises at the time the taxes were levied and the sales by the tax collector were made, and it was his duty to have paid the taxes. *Moss v. Shear*, 25 Cal., 38, covers his case. Nor did the assessment roll for the years in which the taxes were unpaid show any valuation of the property. *Hurlbutt v. Butenop*, 27 Cal., 50; *Woods v. Freeman*, 1 Wall., 398.

As to the rents and profits of the premises since the defendant Larrimore went into possession, there is some conflict in the evidence. Our conclusion is that the premises have been worth to him, since May 26, 1856, \$100 a month, and that amount will be found as the monthly rents and profits.

The plaintiffs are entitled to a joint judgment against all the defendants for the possession of the premises in controversy, and the plaintiff Franklina to a several judgment against the defendant Larrimore for one-half of the estimated rents and profits from May 26, 1856; and the plaintiff Matilda to a several judgment against him for the remaining half of the rents and profits, commencing three years before the filing of the complaint in the present action—the rents and profits to be calculated in both cases up to this date. *Galpin v. Page*, 18 Wall., 350; *Same Case*, 3 Saw., 93; also, *Neff v. Pennoyer*, 3 id., 274.

[NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

INGLE *v.* JONES.

(9 Wallace, 486-500. 1869.)

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is an appeal in equity from the decree of the supreme court of the District of Columbia. The record is voluminous, and contains numerous exhibits, and much of detail, which we have not found it necessary to consider. The material facts lie within a narrow compass, and the questions presented for our determination are neither numerous nor difficult of solution. On the 22d of April, 1851, the testatrix and the appellee entered into a contract for the erection by the latter of a large building in the city of Washington. She was to pay for the structure the sum of \$24,000; \$5,000 on the 1st of July, 1851; \$5,000 on the 1st of October following, provided certain parts of the building were then ready for occupation; and the remaining \$14,000 on the 1st of January, 1860, with interest as stipulated. The first instalment was duly paid. Nothing has been paid since. Possession of those parts of the building to be first completed was delivered in December, 1851, and of the residue in April, 1852. In May, 1852, Jones sued for the instalment due on the 1st of October, 1851, and recovered. The judgment was reversed by this court. 23 How., 220. The declaration was then amended by withdrawing the special counts and enlarging the *ad quod damnum* to \$40,000, and a verdict and judgment were recovered for \$22,149 and interest. This judgment was also reversed. 2 Wall., 1. The case was again tried, and a verdict and judgment were recovered for \$20,136.23, with interest from the 5th of April, 1852. The auditor of the court was directed to ascertain the amount of assets in the hands of Ingle, the administrator, which could be applied in payment of the debt. He reported that there were no assets available for that purpose. Jones thereupon filed this bill to subject the real estate therein described to the payment of his demand.

It is insisted by the counsel for the appellants that the judgment is erroneous in form, and is, in fact, only interlocutory. This objection is well taken. According to the statutes of Maryland, which are in force in the county of Washington, the judgment, under the circumstances, should have been entered only for assets as they should thereafter come into the hands of the administrator. But this fact is immaterial.

The case is governed by the local law. That law makes the proceedings against the administrator and the heir, when the latter proceeding is necessary, entirely independent of each other. The duties of the administrator are confined to the personal estate and never extend beyond it. If that be insufficient to discharge the debts, and it be necessary to resort to the realty of the deceased for that purpose, a proceeding against the heir must be instituted. In that event, whatever has been done by the administrator is without effect as to the property sought to be charged. A judgment against the administrator is not evidence against the heir. The demand must be proved in all respects as if there had been no prior proceeding to effect its collection, and the statute of limitations may be pleaded with the same effect as if there had been no prior recovery against the personal representative. Statutes of Maryland of 1786 and 1798; *Collinson v. Owens*, 6 Gill & J., 4; 8 Pet., 528.

We have examined with care the proofs in the record of the complainant's demand as set forth in the bill, and are satisfied with the amount found by the decree. It could be productive of no good to vindicate this view of the subject by entering into an analytical examination of the testimony. We are not unmindful of the length of time through which the complainant has been pursuing his remedy, nor of the verdicts which have been rendered in the trials at law. They were the results of vigorously contested litigation, after the most elaborate preparation of the case. Nor are we unmindful that the court below, in the case before us, came substantially to the same conclusion. Our judgment, however, has been formed upon grounds wholly apart from these considerations. If the question were *res integra* in this case, and now for the first time to be passed upon, we should have no difficulty in sustaining the decree. We think the full amount found by the court is justly due.

[NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

CHAPTER IV.

PROCESS—ISSUANCE—SERVICE.

Rule 11.

No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

Rule 12.

Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

Rule 7.

The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant can not be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the pur-

pose of compelling obedience to any interlocutory or final order or decree of the court.

Rule 15.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

Rule 13.

The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

Rule 14.

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service is made.

Rule 16.

Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

TOLAND v. SPRAGUE.

(12 Peters, 300-338. 1838.)

Opinion by MR. JUSTICE BARBOUR.

STATEMENT OF FACTS.—This is a writ of error to a judgment of the circuit court of the United States for the district of Pennsylvania. The suit was commenced by the plaintiff in error against the defendant in error, by a process known in Pennsylvania by the name of a foreign attachment; by which, according to the laws of that state, a debtor who is not an inhabitant of the commonwealth is liable to be attached by his

property found therein, to appear and answer a suit brought against him by a creditor.

It appears upon the record that the plaintiff is a citizen of Pennsylvania, and the defendant a citizen of Massachusetts, but domiciled at the time of the institution of the suit, and for many years before, without the limits of the United States, to wit, at Gibraltar; and when the attachment was levied upon his property, not being found within the district of Pennsylvania.

Upon the return of the attachment executed on certain garnishees holding property of or being indebted to the defendant, he, by his attorney, obtained a rule to show cause why the attachment should not be quashed, which rule was afterwards discharged by the court; after which the defendant appeared and pleaded. Issues were made up between the parties, on which they went to trial, when a verdict and judgment were rendered in favor of the defendant. At the trial a bill of exceptions was taken by the plaintiff, stating the evidence at large, and the charge given by the court to the jury, which will hereafter be particularly noticed when we come to consider the merits of the case. But before we do so there are some preliminary questions arising in the case which it is proper for us to dispose of.

And the first is, whether the process of foreign attachment can be properly used by the circuit courts of the United States, in cases where the defendant is domiciled abroad, and not found within the district in which the process issues, so that it can be served upon him?

The answer to this question must be found in the construction of the eleventh section of the judiciary act of 1789 (1 Stat. at Large, 78), as influenced by the true principles of interpretation, and by the course of legislation on the subject.

That section, as far as relates to this question, gives to the circuit courts original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and an alien is a party; or the suit is between a citizen of the state where the suit is brought and a citizen of another state. It then provides that no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and, moreover, that no civil suit shall be brought before either of said

courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ. As it respects persons who are inhabitants or who are found in a particular district, the language is too explicit to admit of doubt. The difficulty is in giving a construction to the section in relation to those who are not inhabitants and not found in the district.

This question was elaborately argued by the circuit court of Massachusetts in the case of *Picquet v. Swan*, reported in 5 Mason, 35. Referring to the reasoning in that case generally as having great force, we shall content ourselves with stating the substance of it in a condensed form in which we concur. Although the process acts of 1789 (1 Stats. at Large, 93) and 1792 (*Id.*, 275) have adopted the forms of writs and modes of process in the several states, they can have no effect where they contravene the legislation of congress. The state laws can confer no authority on this court in the exercise of its jurisdiction, by the use of state process, to reach either persons or property, which it could not reach within the meaning of the law creating it. The judiciary act has divided the United States into judicial districts. Within these districts a circuit court is required to be holden. The circuit court of each district sits within and for that district and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject-matter of suits in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court to have run into any state of the Union. It has not done so. It has not in terms authorized any original civil process to run into any other district; with the single exception of subpoenas for witnesses, within a limited distance. In regard to final process there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered; one in favor of private persons, in another district of the same state; and the other in favor of the United States, in any part of the United States. We think that the opinion of the legislature is thus manifested to be that the process of a circuit court cannot be served without the district in which it is established, without the special authority of law therefor.

If such be the inference from the course of legislation, the same interpretation is alike sustained by considerations of reason and justice. Nothing can be more unjust than that a person should have his rights passed upon and finally decided by a tribunal, without some process being served upon him by which he will have notice which will enable him to appear and defend himself. This principle is strongly laid down in *Buchanan v. Rucker*, 9 East, 192. Now it is not even contended that the circuit courts could proceed to judgment against a person who was domiciled without the United States and not found within the judicial district so as to be served with process, where the party had no property within such district. We would ask what difference there is, in reason, between the cases in which he has and has not such property? In the one case, as in the other, the court renders judgment against a person who has no notice of the proceeding. In the one case, as in the other, they are acting on the rights of a person who is beyond the limits of their jurisdiction and upon whom they have no power to cause process to be personally served. If there be such a difference we are unable to perceive it.

In examining the two restraining clauses of the eleventh section we find that the process of *capias* is in terms limited to the district within which it is issued. Then follows the clause which declares that no civil suit shall be brought before either of the said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ. We think that the true construction of this clause is that it did not mean to distinguish between those who are inhabitants of or found within the district, and persons domiciled abroad, so as to protect the first and leave the others not within the protection; but that, even in regard to those who were within the United States, they should not be liable to the process of the circuit courts, unless in one or the other predicament stated in the clause; and that as to all those who are not within the United States it was not in the contemplation of congress that they would be at all subject, as defendants, to the process of the circuit courts, which, by reason of their being in a foreign jurisdiction, could not be served upon them; and, therefore, there was no provision whatsoever made in relation to them.

If, indeed, it be assumed that congress acted under the idea that the process of the circuit courts could reach persons in a foreign jurisdiction, then the restriction might be construed as operating only in favor of the inhabitants of the United States, in contradistinction to those who were not inhabitants; but, upon the principle which we have stated, that congress had not those in contemplation at all, who were in a foreign jurisdiction, it is easy to perceive why the restriction in regard to the process was confined to inhabitants of the United States. Plainly, because it would not have been necessary or proper to apply the restriction to those whom the legislature did not contemplate as being within the reach of the process of the courts, either with or without restrictions.

With these views, we have arrived at the same conclusions as the circuit court of Massachusetts, as announced in the following propositions, namely: 1. That by the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts. 2. That independently of positive legislation, the process can only be served upon persons within the same districts. 3. That the acts of congress adopting the state process, adopt the form and modes of service only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts. 4. That the right to attach property, to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to the process of the court, *in personam*; that is, where they are inhabitants or found within the United States; and not where they are aliens, or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here; and we add, that even in case of a person being amenable to process *in personam*, an attachment against his property cannot be issued against him, except as part of or together with process to be served upon his person.

The next inquiry is whether, the process of attachment having issued improperly, there has anything been done which has cured the error? And we think that there is enough apparent on the record to produce that effect. It appears that the party appeared, and pleaded to issue. Now, if the case were one of a want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties, by any act of theirs, to give it. But

that is not the case. The court had jurisdiction over the parties and the matter in dispute; the objection was, that the party defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him; and that the process of attachment could only be properly issued against a party under circumstances which subjected him to process *in personam*. Now this was a personal privilege or exemption, which it was competent for the party to waive. The cases of *Pollard v. Dwight*, 4 Cranch, 421, and *Barry v. Foyles*, 1 Pet., 311, are decisive to show that, after appearance and plea, the case stands as if the suit were brought in the usual manner. And the first of these cases proves that exemption from liability to process, and that in case of foreign attachment, too, is a personal privilege, which may be waived; and that appearing and pleading will produce that waiver.

It has, however, been contended, that although this is true as a general proposition, yet the party can avail himself of the objection to the process in this case, because it appears from the record that a rule was obtained by him to quash the attachment, which rule was afterwards discharged; thus showing that the party sought to avail himself of the objection below, which the court refused. In the first place, it does not appear upon the record what was the ground of the rule; but if it did, we could not look into it here, unless the party had placed the objection upon the record in a regular plea; upon which, had the court given judgment against him, that judgment would have been examinable here. But in the form in which it was presented in the court below, we cannot act upon it in a court of error.

The judiciary act authorizes this court to issue writs of error to bring up a final judgment or decree in a civil action, or suit in equity, etc. The decision of the court upon a rule or motion is not of that character. This point, which is clear upon the words of the law, has been often adjudged in this court; without going further, it will be sufficient to refer to 6 Pet., 648; 9 Pet., 4. In the first of these cases the question is elaborately argued by the court, with a review of authorities; and they come to this conclusion that they consider all motions of this sort, that is, to quash executions, as addressed to the sound discretion of the court; and as a summary relief, which the court is not compellable to allow. That the refusal to quash is not, in the sense of the common law, a judgment;

much less is it a final judgment. It is a mere interlocutory order. Even at common law, error only lies from a final judgment; and by the express provisions of the judiciary act, a writ of error lies to this court only in cases of final judgments.

Having now gotten rid of these preliminary questions, we come, in the order of argument, to the merits of the case. To understand these, it will be necessary to look into the pleadings, the evidence, and charge of the court, as embodied in the exceptions.

The declaration is in *assumpsit*, and originally contained three counts, namely, the first, a count charging the delivery of certain goods to the defendant, upon a promise to account and pay over the proceeds, or sale thereof, by the defendant; and a breach of promise, in not accounting, or paying the proceeds of the sale. Secondly, a count in *indebitatus assumpsit*; and thirdly, a count upon an account stated. A rule having been granted to amend the declaration, by striking out this last count, and that rule having been made absolute, we shall consider the declaration as containing only the first two counts. To this declaration the defendant pleaded the general issue, which was joined by the plaintiff, and also the act of limitations; to this second plea, the plaintiff replied, relying on the exception in the statute in favor of such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; averring that the money in the several promises in the declaration became due and payable on trade had between the plaintiff and defendant, as merchant, and merchant and factor, and wholly concerned the trade of merchandise between the plaintiff as a merchant, and the defendant as a merchant and factor of the plaintiff; and averring, also, that no account whatever of the said money, goods and merchandises, in the declaration mentioned, or any part thereof, was ever stated, or settled between them. The defendant rejoined that he was not the factor of the plaintiff; and that the money in the several promises in the declaration mentioned did not become due and payable in trade had between the plaintiff and defendant as merchant, and merchant and factor; and on this, issue was joined. On the trial of these issues there were sundry letters between the parties, and accounts given in evidence, which are set forth at large in a bill of exceptions, in relation to which the court gave a charge

to the jury ; the jury having found a verdict for the defendant, and the court having rendered a judgment in his favor, the case is brought by the plaintiffs into this court by writ of error. And the question is, whether there is any error in the charge of the court, as applied to the facts of the case stated in the exception. The court, after going at large into the facts of the case, and the principles of law applying to it, concluded with this instruction to the jury : That there was no evidence in the cause which could justify them in finding that the account in evidence was such a mutual, open one, as could bring the case within the exception of the act of limitations.

In deciding upon the correctness of this instruction, it is necessary to inquire what is the principle of law by which to test the question whether a case does or does not come within the exception of the statute in favor of accounts between merchant and merchant, their factors or servants. No principle is better settled than that, to bring a case within the exception, it must be an account ; and that, an account open or current. See 2 Wms. Saund., 127 d, e, note 7. In 2 Johns., 200, the court say that the exception must be confined to actions on open or current accounts ; that it must be a direct concern of trade ; that liquidated demands, or bills and notes which are only traced up to the trade or merchandise, are too remote to come within this description. But the case of *Spring v. Gray*, 6 Pet., 151, takes so full and accurate a review of the doctrine and cases as to render it unnecessary to refer to other authorities. It distinctly asserts the principle that the account, to come within the exception, must be open or current. This construction, so well settled on authority, grows out of the very purpose for which the exception was enacted. That purpose was to prevent the injustice and injury which would result to merchants having trade with each other, or dealing with factors, and living at a distance, if the act of limitations were to run, where their accounts were open and unsettled ; where, therefore, the balance was unascertained, and where, too, the state of the accounts might be constantly fluctuating, by continuing dealings between the parties.

But when the account is stated between the parties, or when anything shall have been done by them which, by their implied admission, is equivalent to a settlement, it has then become an ascertained debt. In the language of the court of

appeals of Virginia (4 Leigh, 249), "all intricacy of account, or doubt as to which side the balance may fall, is at an end ;" and thus the case is neither within the letter nor the spirit of the exception. In short, when there is a settled account, that becomes the cause of action, and not the original account, although it grew out of an account between merchant and merchant, their factors or servants.

Let us now inquire how far this principle applies to the facts of this case. It appears by the bill of exceptions that the facts are these :

In the year 1824 the plaintiff consigned a quantity of merchandise, by the ship William Penn, bound for Gibraltar, to a certain Charles Pettit, accompanied with instructions as to the disposition of it. Pettit, after arriving at Gibraltar, and remaining there a short time, placed all the merchandise belonging to the plaintiff, which remained unsold, in the hands of the defendant, to be disposed of by him for plaintiff's account. The plaintiff produced on the trial an account of the sales of the aforesaid merchandise, dated June 30, 1825, signed by the defendant, as having been made by him, amounting in net proceeds to \$2,579.13 ; and showing that balance.

In September, 1825, the plaintiff wrote to the defendant, requesting him to remit to him the net proceeds of this merchandise, amounting to \$2,579.13 ; after deducting therefrom a bill of exchange of \$1,000, which had been drawn by defendant in favor of Charles Pettit, on a house in New York. Pettit being indebted to the defendant, as alleged by him, in a large sum of money, for advances and otherwise, the defendant refused to pay the plaintiff the amount of the sales of the merchandise ; and denied his liability to account to him therefor.

In addition to the demand before stated, by plaintiff on the defendant, for the balance of the account of sales by letter, on the trial of the cause, the counsel for the plaintiff, in opening the case, claimed the balance of an account between Sprague, the defendant, and Charles Pettit ; being the precise amount of the balance of the account of sales, after deducting the bill of exchange for \$1,000. It appears that the plaintiff was in possession of the account of sales as early as September, 1825.

Upon this state of facts appearing in the record, the question is, whether the cause of action in this case is an open or current account between the plaintiff and defendant, as mer-

chant and factor, concerning merchandise; or whether it is an ascertained balance, a liquidated sum, which, although it grew out of a trade of merchandise, is in legal effect, under the circumstances, a stated account? We think it is the latter.

In the language of the court who gave the charge, we think that "the claim is for a precise balance, which was demanded by the plaintiff from the defendant in 1825." From the nature of the account and the conduct of the parties there was from the time the account of sales was received by the plaintiff showing the balance, and demanded by the plaintiff of defendant, no unsettled open account between them as merchant and merchant, or merchant and factor. We agree in opinion with the circuit court that there was a matter of controversy brought to a single point between them; that is, which of them had, by law, a right to a sum of money, ascertained by consent to amount to \$1,579. That the nature of the account is not changed by there being a controversy as to a balance stated, which the defendant does not ask to diminish, or the plaintiff to increase; and as neither party asks to open the account, and both admit the same balance, there can be no pretense for saying that it is still open. As the circuit court say, the question between them is not about the account, or any item in it; but as to the right of the defendant to retain the admitted balance, to repay the advances made to Pettit. We agree with the court that the mere rendering an account does not make it a stated one; but that if the other party receives the account, admits the correctness of the items, claims the balance, or offers to pay it, as it may be in his favor or against him, then it becomes a stated account. Nor do we think it at all important that the account was not made out as between the plaintiff and defendant; the plaintiff having received it, having made no complaint as to the items or the balance, but on the contrary having claimed that balance, thereby adopted it; and by his own act treated it as a stated account. We think, therefore, that the act of limitations began to run from the year 1825, when that demand was made; and consequently that the instruction of the court was correct in saying that it was not within the exception.

It has, however, been argued, that whatever might be the conclusion of the court, as resulting from the evidence, that the defendant had admitted upon the record that the account

was an open one. It is said that the plaintiff having averred in his replication that there was no account stated or settled between him and the defendant, and the defendant not having traversed that averment in his rejoinder, the matter contained in that averment is admitted. It is a rule in pleading, that where in the pleading of one party there is a material averment, which is traversable, but which is not traversed by the other party, it is admitted. We think that the rule does not apply to this case, because the negative averment in the replication, that no account had been stated between the parties, was not a necessary part of the plaintiff's replication, to bring him within the exception of the statute in relation to merchants' accounts. Inasmuch, then, as the replication without that averment would be sufficient, we do not consider it as one of those material averments, the omission to traverse which is an admission of its truth, within the rule before stated.

But in another aspect of this case the statute of limitations would apply to and bar the plaintiff's claim, if the account of sales were regarded as having no operation in the case. The plaintiff, standing in the relation which he did to the defendant, as it respects this merchandise, had a right to call upon him to account; he did make that demand, and the defendant refused to render one, holding himself liable to account to Pettit only. From the moment of that demand and refusal the statute of limitations began to run. See 1 Taunton, 572.

It was argued that the question whether there was a stated account or not was a question of fact for the jury; and that therefore the court erred in taking that question from them, and telling them that this was a stated account. The answer is that there was no dispute about the facts; and that the plaintiff claimed the balance of the account as being the precise sum due him. It was therefore competent to the court to instruct the jury that it was a stated account. Upon the whole, we think there is no error in the judgment: it is therefore affirmed, with costs.

TANEY, C. J., and JUSTICES BALDWIN and WAYNE, dissented from that part of the opinion which decides that the circuit courts have not the power to issue the process of attachment against the property of a debtor who is not a resident of the United States; but contending that the point was not properly before the court.

EX PARTE GRAHAM.

(Circuit Court for Pennsylvania: 3 Washington, 456-464. 1818.)

Opinion by WASHINGTON, J.

The question turns upon the authority of the district or circuit court of one district to issue its process into any other district to compel the appearance of a person residing or found within the latter jurisdiction before the court from which the process issued; or to stand committed for any alleged contempt of that court.

It is admitted that these courts, in the exercise of their common law and equity jurisdiction, have no authority, generally, to issue process into another district, except in cases where such authority has been specially bestowed by some law of the United States. The absence of such a power would seem necessarily to result from the organization of the courts of the United States, by which two courts are allotted to each of the districts into which the United States are divided; the one denominated a district, the other a circuit court.

This division and appointment of particular courts for each district necessarily confines the jurisdiction of the local tribunals within the bounds of the respective districts within which they are directed to be holden. Were it otherwise, and the court of one district could send compulsory process into any other, so as to draw to itself a jurisdiction over persons or things without the limits of the district, there would result a clashing of jurisdiction between those courts which could not easily be adjusted, and an oppression upon suitors too intolerable to be endured.

But the legislature of the United States, from abundant caution as it would seem, has not left this subject to implication. After conferring upon those courts respectively the portion of jurisdiction which congress intended they should exercise, the eleventh section of the act of 24th September, 1789, chapter 20, declares "that no person shall be arrested in one district, for trial in another, in any civil action before a circuit or district court; nor can a civil suit be brought before either of those courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ."

These provisions appear manifestly to circumscribe the juris-

diction of those courts as to *the person* of the defendant by the limits of the district where the suit is brought; and that the process of those courts was considered by the legislature to be bounded by the same limits is obvious from the subsequent acts passed; the one on the 2d of March, 1793, chapter 22, section 6, authorizing subpoenas for witnesses to attend the courts of one district to run into any other district, not exceeding, in civil cases, one hundred miles from the place of holding the court; and the other, on the 3d of March, 1797, chapter 74, section 6, which authorizes writs of execution upon judgments obtained *at the suit of the United States* in any of their courts in one state to run and be executed in any other state or territory.

It would seem that these provisions were made, not because they were supposed by congress to be necessary, in consequence of the eleventh section of the judicial law, but because the jurisdiction of the courts was essentially confined by their organization within the limits of their respective districts; for it is to be observed that that section applies exclusively to *original suits*, and to the *parties in those suits*; and therefore imposed no restraint, in respect to writs of execution and subpoenas for witnesses, which could render the above provisions at all necessary.

But it has been argued that these restraints are incompatible with the essential jurisdiction of an admiralty court, more especially in prize causes.

That the laws of the United States authorize the distinction which is contended for between the courts of common law and equity, and the admiralty jurisdiction has not, and it is confidently believed cannot, be shown.

It is true that the ninth section of the judiciary act gives to the district courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction without limitation; and it is not less true that the eleventh section gives to the circuit courts original cognizance of all suits of a *civil nature*, at common law and in equity, where an alien is a party or the suit is between a citizen of the state where the suit is brought and a citizen of another state, equally unlimited, except as to the amount. But the jurisdiction of these courts, though unlimited as to the *subject-matter* of which they have cognizance, by any express declaration of the legislature, is nevertheless limited in point of *locality*, as well by the gen-

eral principles of law which our courts acknowledge as rules of decision, as by the express provisions of the eleventh section of the judiciary law before mentioned. As to the first, it will be acknowledged that there is no law of congress which limits the jurisdiction of the courts by *the nature of the suits* of which they have cognizance. By what law, then, is it that actions of ejectment, dower and trespass, in relation to real property, can be brought only in the district where the land lies?

If the defendant be served with process in the district where the suit is brought, neither the eleventh section nor any other provision in the act of congress has restrained the jurisdiction of the court in the supposed cases. The only answer to the question is that the want of jurisdiction is the result of certain general principles of law acting upon the particular subject.

In like manner the jurisdiction of these courts, when sitting in admiralty or prize cause, is limited by those general principles which apply to courts of admiralty in England and the United States as well as in other countries. Though bounded only by the nature of the causes over which they are to decide, and not in any respect by *place*, it is nevertheless essential to the exercise of this jurisdiction by any particular court that the person or thing against whom or which the court proceeds should be within the local jurisdiction of such court. Such was the jurisdiction of the several vice-admiralty courts of Great Britain, in America and the West Indies, until the statute of the forty-first of George III., which, whether sitting as instance or prize courts, were confined to breaches of the revenue laws committed within their local jurisdictions, and to cases of vessels, etc., brought within their local jurisdiction. The only exception to the general rule above stated, applicable to the court of admiralty in prize causes, is that of a vessel lying in the port of a neutral country, most unwillingly assented to by Sir W. Scott under the sanction of precedents, but powerfully opposed by the reasons urged against it by that distinguished judge. But even in that case it was never pretended that the process of the court could go into the neutral country to compel an appearance or enforce the execution of a sentence.

But secondly, the jurisdiction of these courts in prize causes is limited as to *persons* by the express provisions of the eleventh section of the judiciary law before referred to

Prize proceeding against an inhabitant of the United States

is unquestionably a civil suit; and if it be against the person instead of the thing, the jurisdiction is excluded, unless it be instituted in the court of the district whereof he is an inhabitant or is found at the time of serving the process. The manifest policy of the judicial system of the United States was to render the administration of justice as little oppressive to suitors and others as possible; and it corresponds entirely with that construction which confines the process of the courts within the limits of the district in which the court sits and from which it issued.

In the exercise of a jurisdiction over persons not inhabitants of or found within the district where the suit is brought, there are difficulties which, in the opinion of the court, nothing but an act of congress can remove. In what manner, for instance, is the marshal to dispose of the person? He has no authority to conduct him beyond the limits of his district, nor to deliver him over to the marshal of an adjoining district for that purpose. Can he commit him to the gaol of the district where the arrest was made? If he can, the case would present a very extraordinary novelty in jurisprudence—that of a defendant imprisoned in one district to answer to a suit depending against him in another, how great soever the distance of the one place might be from the other.

In criminal cases, where the offender is arrested in one district for trial in another, the thirty-third section of the judicial law has provided, not only for the removal of the offender and witnesses, but also for the transmission of the process and recognizance taken in the case to the proper court. In like manner, should it be the will of congress to vest in the courts of the United States an extra-territorial jurisdiction in prize causes over persons and things found in a district other than that from which the process issued, it would seem to be proper, if not absolutely necessary, at the same time to prescribe the mode of executing the process.

Upon the whole we are of opinion that the petitioner ought to be discharged.

PHOENIX MUTUAL LIFE INS. CO. *v.* BERTHA WULF, *et al.*

(9 Bissel 285, 1880).

GRESHAM, J. The defendant, Bertha Wulf, owned certain real estate in Indianapolis, which she conveyed, her husband joining, to a third person, who conveyed it back to her hus-

band, Henry Wulf. The husband, the wife joining, then mortgaged the same property to the Phoenix Mutual Life Insurance Company to secure a loan. The mortgage showed upon its face that it was to secure a loan to the husband. The loan was not paid at maturity, and afterward the mortgage was foreclosed in this court.

Bertha Wulf subsequently brought suit in this court to set aside her deed to the third party, his deed to her husband, and the mortgage of herself and husband to the insurance company on the sole ground that she was a minor when she executed those instruments. The service in the foreclosure suit was after Bertha Wulf had attained her majority, and the decree against her was by default.

The marshal's return shows that the subpoena in the foreclosure suit was properly served on Henry Wulf in compliance with equity rule 13. As to the wife, the return reads thus: "I served Bertha Wulf by leaving a copy for her with her husband." Sometime after the wife commenced her suit, as already stated, the marshal appeared and asked leave to amend his return, so as to show that he had served the subpoena on her by leaving a copy for her with her husband, at her dwelling-house or usual place of abode.

The defendant, Henry Wulf, occupied a building at the corner of Virginia avenue and Coburn street, in Indianapolis, both as a dwelling and a family grocery. In the lower story there were two rooms, the main one being occupied as a grocery, and the back smaller one for storage purposes. These two rooms were separated by a hall which was entered by a door from Coburn street, and also from Virginia avenue through the grocery. A stairway led from the hall to the second story, where the family dwelt, eating and sleeping. The hall and stairway were accessible in both ways. The deputy marshal found the husband in the grocery and there served the subpoena on him and then inquired for his wife, and was informed that it was early in the morning and she was upstairs in bed where the family lived. The officer, then, in the grocery, handed to the husband a copy of the subpoena for his wife.

Upon these facts was there a valid service on the wife under the 13th Equity Rule, which declares that the service of all subpoenas shall be by a delivery of a copy thereof, by the officer serving the same to the defendant personally, or by

leaving a copy thereof at the dwelling-house or usual place of abode of each defendant with some adult person who is a member or resident in the family?

It is urged by counsel that the officer handed to the husband a copy of the subpoena when he was not at the "dwelling-house or usual place of abode"—that the grocery room was as distinct from the residence in the upper story, as if the two had been in separate buildings miles apart. That construction of the rule is narrow and unreasonable. It is conceded that if the officers had handed the copy to the husband in the hall the service would have been good, because the upper story was approached only through the hall, and it was therefore connected with the dwelling. There were but two ways of ingress to the residence or upper story—one from Virginia avenue, through the grocery, and the other through the door opening from Coburn street. The family passed in and out as best suited their convenience. A copy was left with one who understood its contents and was likely to deliver it to the person for whom it was intended.

The case of *Kibbe v. Benson*, 17 Wallace, 625, is cited against the sufficiency of the service. That was an action of ejectment in the circuit court of the United States for the Northern District of Illinois, which had adopted the statute of that state relating to actions of ejectment. After judgment was entered for the plaintiff by default, the defendant filed a bill in equity to set aside the judgment on the ground that he had no notice or knowledge of the pendency of the suit and for fraud. The Illinois statute required that in actions of ejectment, where the premises were actually occupied, the declaration should be served by delivering a copy to the defendant named therein, who should be in the occupancy of the premises, or if absent, by leaving the same with a *white* person of the family of the age of ten years or upwards "at the dwelling-house of such defendant."

On the trial of the equity suit, one Turner swore that when he called at Benson's house to serve upon him the declaration, he was informed by Benson's father that Benson was not at home, and that while the father was standing near the southeast corner of the yard, adjoining the dwelling-house, and inside the yard, and not over 125 feet from the dwelling-house, he handed him a copy of the declaration, explaining its nature, and requesting him to hand it to his son, after which the

father threw the copy upon the ground, muttering some angry words.

There was a conflict in the testimony, but the circuit court decided that even if the copy was handed to the father, as testified to by Turner, the service was not sufficient, and set aside the judgment which had been entered by default, and the decree was affirmed on appeal. In deciding the case the Supreme Court say : " It is not unreasonable to require that it (copy of the declaration) should be delivered on the steps, or on a portico, or in some out-house adjoining to or immediately connected with the family mansion, where, if dropped or left, it would likely reach its destination. A distance of 125 feet, and in a corner of the yard, is not a compliance with the requirement."

Rule 13 should receive a literal construction. It does not require the copy of the subpoena to be left with a person in the dwelling-house ; it is sufficient if the person who receives the copy is at the dwelling-house. The rule is satisfied by a service outside the dwelling-house at the door, just as well as inside the house. I think Bertha Wulf was in court when the decree of foreclosure was entered. This is not a motion to correct the pleadings, judgment or process.

Courts have the power to permit officers to amend their returns to both mesne and final process, and the power is exercised liberally in the interest of justice, especially when the rights of third parties are not to be affected by the amendment. In the exercise of sound discretion they have allowed officers to amend their returns according to the real facts after the lapse of several years, and when there is no doubt about the facts, such amendments have been allowed after the officer's term has expired.

I think justice requires that the amendment should be allowed in this case.

GRACIE, *et al.*, v. PALMER, *et al.*

(8 Wheaton 699, 1823.)

Mr. Webster moved to dismiss the writ of error in this case, for want of jurisdiction. He stated that the plaintiffs below, Palmer and others, were described to be aliens, and subjects of the King of Great Britain, and the defendants, Gracie and others, to be citizens of the State of New York, and the suit was brought in the circuit court of Pennsylvania.

It did not appear that the defendants were inhabitants of, or found in the district of Pennsylvania at the time of serving the writ; and he therefore contended, under the 11th section of the Judiciary Act of 1789 c. 20, that no civil suit could be brought against them by original process in that district.

Mr. Chief Justice Marshall stated, that the uniform construction, under the clause of the act referred to, had been, that it was not necessary to aver, on the record, that the defendant was an inhabitant of the district or found therein. That it was sufficient if the court appeared to have jurisdiction by the citizenship or alienage of the parties. The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, was the privilege of the defendant, which he might waive by a voluntary appearance.

That if the process was returned by the marshal as served upon him within the district, it was sufficient; and that where the defendant voluntarily appeared in the court below, without taking the exception, it was an admission of the service, and a waiver of any further inquiry into the matter.

Motion denied.

PARSONS v. HOWARD.

(Circuit Court for Louisiana: 2 Woods, 1-7. 1873.)

STATEMENT OF FACTS.—This is a bill in equity by complainants, who state that they, defendants and certain other persons were partners in the lottery business, and one of their articles of agreement was that if any associate should acquire any lottery privilege it should be transferred to the company as part of the common stock. It charged that defendants had acquired such privileges in Louisiana and excluded complainants from participation. The prayer was for an injunction, sale, etc. Parsons having died, a bill of revivor was filed. There was a demurrer to the original bill and a plea to the bill of revivor. Further facts appear in the opinion of the court.

Opinion by BRADLEY, J.

The plea to the bill of revivor in this case is good, if true, and if the suit proceeds farther the complainants must reply to it, and proceed to proofs. I observe that the only allegation in the bill of revivor is that the complainants therein have obtained letters of executorship on the estate of Reuben Par-

sons, deceased, without specifying any last will, any state or place, or court, in which the letters were issued. This is extremely informal. All these particulars should have been stated, so that the court could see that the complainants were fully entitled to be substituted in the place of Parsons. Letters testamentary, issued in New York, have no efficacy in Louisiana, unless the laws of the latter state make provision to that effect.

The demurrer to the original bill states, as causes of objection, want of parties, multifariousness, immorality of the transactions on which the prayer for relief is founded, and general want of equity. The substantive charge of the bill is that the defendants, together with Zachariah E. Simmons and John A. Morris, are carrying on a lucrative lottery business in New Orleans, and in the state of Louisiana, and appropriating the profits to their own use, whilst in equity the complainants and certain other persons are entitled to a share of said business, of which the defendants, together with Simmons and Morris, unjustly deprive them; and the relief sought is an account of the profits of the said business, a declaration that the defendants are trustees for the complainants, and the other parties really interested, and a sale of the whole property and business and division of the proceeds.

The ground on which this claim is based is that Murray, one of the defendants, and Simmons and Morris, were formerly associated in the lottery business with the complainants and other persons, jointly as partners in a firm, whose style was generally C. H. Murray & Co., under an arrangement which commenced September 1, 1863, to last for ten years, by which the parties to the arrangement, having transferred all their interest in the lottery business, and grants to trustees (Simmons, Murray and Davis), for the purpose of being carried on by them for the mutual benefit of the proprietors, agreed to do the same with any other lottery grants, or interests therein, which they might severally acquire, under penalty of forfeiting the interest they already possessed in the joint business—the object of the assignments and trust being declared to be the avoiding of conflict of interest between the parties and the advantages of a consolidation and joint control of the whole business. The complainants were not originally parties to this arrangement; but in December, 1867, they became parties thereto, by purchase, with others, of cer-

tain of the shares, and in January, 1868, they became further interested by consolidating certain lottery interests of themselves and others with the said lottery business of the associates.

The whole concern then consisted of one hundred and fifteen shares, of which the complainants owned two and a half shares.

The defendant Howard was not an associate, but was agent of the concern in New Orleans.

The gravamen of complaint is that in the summer of 1868, whilst the business was thus carried on jointly, the defendants, Howard and Murray, with Zachariah E. Simmons, John A. Morris and other parties concerned and interested in the said business, procured from the legislature of Louisiana an exclusive lottery grant in the shape of a legislative act, under which a corporation called the Louisiana State Lottery Company was organized by them, and a contract made with that corporation for carrying on the lottery business in Louisiana, and that the funds of the joint concern of C. H. Murray & Co. were used by them in procuring said grant and establishing said business, and that by this contrivance they have monopolized the lottery business in that state and excluded the complainants and their other associates from all participation therein.

This is the business which the complainants claim as in equity belonging to the joint concern of C. H. Murray & Co., and for the proceeds of which they seek an account and settlement.

The bill states that Morris, Simmons, Wm. F. Simmons, Wm. C. France, Benj. Wood and Henry Cotton are not made parties because they are citizens of the same state with the complainants. Conceding, as I am inclined to do, that if the facts stated in the bill are true, the claim is well founded and free from the taint of immorality, and that there is no ground for the charge of multifariousness, a question of much gravity still remains in reference to the alleged want of proper parties.

I do not perceive any reason for making the Louisiana State Lottery Company a party. Nothing is demanded of it, and no charges of misconduct are made against it. It is no concern of the corporation that its stockholders are responsible to third parties for dividends and profits received. It has

nothing to do with their controversies, unless in some way involved therein as a corporate body. Much less is the corporation concerned in the responsibility under which its contractors or agents may have brought themselves in reference to third parties.

As to Simmons and Morris, regarded as jointly guilty with the defendants, it is sufficient to say that a breach of trust or an act of bad faith, like a tort at common law, renders the parties, severally as well as jointly, liable as tort-feasors or breakers of trust: therefore they are not necessary parties.

There is more force in the objection that the other associates and co-partners of the complainants, interested in the same manner as they, are not made parties. If this were the case of an ordinary bill for the settlement of partnership accounts it is clear that all the partners would be necessary parties, because each has not only an interest in the general balance according to his share in the concern, but has an equitable lien for all advances made by him in its behalf, and is liable in equity as a partner for the advances made by the others; so that no settlement could be made without the actual or constructive presence of all. Hence all must be made parties; and if any of them are non-residents process must nevertheless be issued; and in the old English practice certain forms had to be observed (terminating in the commission of rebellion) before the case could be heard. See Daniell's Ch. Pr., 1253.

In this country constructive service by publication is generally prescribed and allowed; but as it has been held that the federal courts have no means of effecting constructive service, such cases cannot be brought in them unless the non-resident defendants voluntarily appear; and not even then if they are citizens of the same state with the complainants. The present case, it is true, is not that of the settlement of a partnership concern. The bill seeks to make the defendants account for property in their hands, alleged to be partnership property, and make them trustees for the copartnership in respect thereof. The suit is brought, therefore, for the equal benefit of all the copartners who are not implicated in the transactions complained of. The fact that some of the defendants are copartners does not divest it of the character of a joint partnership demand. If the firm had held a mortgage on the lands of some of the partners for money lent, the complainants could as well have filed a bill to foreclose that

mortgage, without making the other partners parties, as to file this bill. They do not even allege that they file it on behalf of themselves and the other partners, which, perhaps, they might do if the number were so great as to render it impracticable that all should be joined. It is simply the case of one or two partners suing alone for a partnership demand without joining the other partners. To this the defendants have a right to object; for if these complainants can maintain this suit, the other partners similarly interested might maintain similar suits in other courts for the recovery of the same demand. The excuse given, that to make the others parties would oust the court of jurisdiction, is not sufficient. That consequence cannot make it regular to proceed without them. That only proves that this court is not the proper tribunal to settle the controversy. If it be once settled that the other partners are not merely proper but necessary parties, the complainants cannot set up the limited jurisdiction of the court for not making them such.

If, like legatees and distributees of a deceased person's estate, they were entitled to an aliquot share of the moneys sought to be recovered, irrespective of the shares and accounts of their co-legatees or co-successors; or, in the language of the common law, if they were tenants in common as contradistinguished from joint tenants, or if their titles were both joint and several, they might with more reason be entitled to sue alone for their aliquot share, although an accounting might be necessary to ascertain the amount due.

But the moneys sought to be recovered in this case are confessedly partnership moneys, and the complainants pray that they may be accounted for as such, and paid into the common partnership fund. In this state of things it is evident that all the other partners are equally interested in the suit with the complainants themselves, and are virtually parties to it, whether made such or not; and as no sufficient excuse is alleged for not joining therein, the bill is necessarily defective.

The case is essentially different from that of a suit brought *against* partners. In that case, as all are jointly liable *in solido*, or according to the civil law, each is liable only for his virile share, a suit could probably be sustained against some of the partners, though the others could not be found within this jurisdiction. The demurrer must be allowed, with costs.

LOWENSTEIN *v.* GLIDEWELL.

(Circuit Court for Arkansas, 5 Dillon, 325-329; S. C., 6 Rep'r, 454; 7 Cent. L. J., 167. 1878.)

STATEMENT OF FACTS.—Plaintiff filed bill to foreclose deed of trust. Partee and wife were made defendants upon allegation of interest. Partee and wife answered, and also filed cross-bills praying cancellation of deed of trust, etc. No process was issued on cross-bill, and plaintiffs in original bill did not enter appearance. Plaintiff in original bill moved to discontinue. Partee and wife objected and moved for decree *pro confesso* on cross-bill.

Opinion by CALDWELL, J.

The plaintiffs in the original bill have the right, as a matter of course, at any time before decree, to dismiss their bill at their own costs. 1 Barb. Ch. Prac., 225, 228; 1 Daniell's Ch. Prac., 792. The cause is not at issue on the original bill—no replication to the answer having been filed—and the defendants in that bill, under rule 66, might have obtained an order, as of course, for a dismissal of the suit for this reason.

The motion of plaintiffs to dismiss their bill is granted, and the same will be dismissed at their costs. The motion of plaintiffs in the cross-bill for a decree *pro confesso* thereon against the defendants therein named is denied. If the defendants in the cross-bill had been served with process, or had voluntarily entered their appearance in the cross-bill, the plaintiffs therein would have been entitled to a decree *pro confesso* after the lapse of the time allowed defendants by the rules to answer.

The bill and cross-bill in equity do not necessarily constitute one suit, and, according to the established practice in equity, the service of a subpoena on the defendants in the cross-bill, although they are parties in the original bill, and in court for all the purposes of the original bill, is necessary to bring them into court on the cross-bill, unless they voluntarily enter their appearance thereto, which is the usual practice. And the general chancery rule is that service of the subpoena in chancery to answer a cross-bill cannot be made upon the solicitor of the plaintiff in the original bill. 1 Hoff. Ch. Prac., 355, and note 4.

In the chancery practice of the circuit courts of the United States there are two exceptions to this rule—(1) in case of injunctions to stay proceedings at law, and (2) in cross-suits in

equity where the plaintiff at law in the first and the plaintiff in equity in the second case reside beyond the jurisdiction of the court. In these cases, to prevent a failure of justice, the court will order service of the subpoena to be made upon the attorney of the plaintiff in the suit at law in the one case, and upon his solicitor in the suit in equity in the other. *Eckert v. Bauert*, 4 Wash., 370; *Ward v. Sebring*, id., 472; *Dunn v. Clark*, 8 Pet., 1. And for application of analogous principles to parties to cross-bills, see *Schenck v. Peay*, 1 Woolw., 175.

It not unfrequently occurs that the facts constituting defendant's defenses to an action or judgment at law are of a character solely cognizable in equity, and in suits in equity it often happens that the defendant can only avail himself fully and successfully of his defense to the action through the medium of a cross-bill. In suits in these courts the plaintiff is usually a citizen of another state, and hence beyond the jurisdiction of the court, and in such cases defendants who desire to enjoin proceedings at law, and defendants in equity cases who desire to defend by means of a cross-bill, would, but for this rule of practice, be practically cut off from their defenses by reason of their inability to make service on the plaintiff in the action. It would be in the highest degree unjust and oppressive to permit a non-resident plaintiff to invoke the jurisdiction of the court in his favor, and obtain and retain, as the fruits of that jurisdiction, a judgment or decree to which he was not in equity entitled by remaining beyond the jurisdiction of the court whose jurisdiction on the very subject-matter, and against the very party, he had himself first invoked. The reason of the rule would seem to limit it in equity cases to cross-bills either wholly or partially defensive in their character, and to deny its application to cross-bills setting up facts not alleged in the original bill, and which new facts, though they relate as they must to the subject-matter of the original bill, are made the basis of the affirmative relief asked. The cross-bill in this case is of this latter character, and without deciding that this fact alone would preclude the court from directing service of the subpoena on the solicitors of the plaintiffs in the original bill, such an order will not be made after plaintiffs have filed their motion to dismiss their bill—a motion grantable as of course.

Whether the dismissal of the original bill carries with it the cross-bill depends on the character of the latter. If the

cross-bill sets up matters purely defensive to the original bill and prays for no affirmative relief, the dismissal of the latter necessarily disposes of the former. But where the cross-bill sets up, as it may, additional facts not alleged in the original bill relating to the subject-matter, and prays for affirmative relief against the plaintiffs in the original bill in the case thus made, the dismissal of the original bill does not dispose of the cross-bill, but it remains for disposition in the same manner as if it had been filed as an original bill. *Warrell v. Wade*, 17 Ia., 96 ; 2 Daniel's Ch. Prac., 1556.

The cross-bill in this case is of this character and it will remain on the docket, and the plaintiffs therein can take such action in relation thereto as they may be advised, but no steps can be taken in the case until defendants are brought into court.

Ordered accordingly.

CHAPTER V.

DEFAULT AND DECREE PRO CONFESSO.

Rule 18.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

Rule 19.

When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge

the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the cost of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct for the purpose of speeding of the cause.

MARYE *v.* STROUSE.

(Circuit Court of Nevada, 6 Sawyer, 204-220. 1880.)

Opinion by HILLYER, J.

The motion for a new trial came up first regularly for hearing on the first Monday of March, and at that time the plaintiff appeared, and, without any objection to the notice, consented to a continuance. Admitting, what is doubtless correct, that the notice was insufficient, I still am of the opinion that this general appearance on the part of plaintiff must be considered a waiver of the want of due notice. In its nature it resembles the summons issued at the commencement of the suit, and a general appearance is a waiver of all irregularities in the service of a summons.

[NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

O'HARA *et al.* *v.* MACCONNELL *et al.*, Assignees

(93 U. S., 150. 1876.)

Appeal from the circuit court of the United States for the Western District of Pennsylvania.

The facts are stated in the opinion of the court.

MR. JUSTICE MILLER delivered the opinion of the court.

Michael O'Hara was adjudged a bankrupt December 9, 1867, and the appellee duly appointed assignees, to whom an assignment of his effects was made in due form. As such assignees they filed in the circuit court for the Western District of Pennsylvania the bill in chancery on which the decree was rendered from which the present appeal is taken. The bill alleges that a conveyance of certain real estate made by said O'Hara and his wife Frances, on the tenth day of July, 1866, to William Harrison and G. L. B. Fetterman, in trust

for the use of the wife, was a fraud upon creditors, and prays that the deed be declared void, and that O'Hara, his wife, and Barr, her guardian, be decreed to convey the land to complainants, that they may sell it for the benefit of O'Hara's creditors, free from the embarrassment created by said deed of trust.

The bill also alleges that Mrs. O'Hara is a minor, and that A. M. Barr is her legal guardian.

A subpoena was issued on the fifth day of April, 1869, and served on the seventh on O'Hara, for himself and wife, and on Barr; and on the seventh day of May following, without appearance and without answer by any defendant, the bill was amended, was taken as confessed, and a final decree rendered. This decree enjoined the defendants from setting up any claim to the land, and ordered all of them to convey and release the same to assignees; and in default of such conveyance within thirty days, Henry Sproul was appointed commissioner to do it in their name. A copy of this decree was served on the defendants May 10th; on the 14th of June the order was complied with by a deed made by O'Hara, his wife and Barr, which on its face purports to be in execution of the order, and for the consideration of one dollar. It will thus be seen that within less than five weeks from the filing of the bill, and without any actual service of the writ or other notice on her, a decree was entered against a woman who was both a minor and a feme covert, without the appointment of a guardian *ad litem*, without any appearance by her or for her, depriving her of fourteen acres of land now within the limits of the city of Pittsburg. It is from this decree that she appeals.

By the thirteenth rule of practice of the courts of equity of the United States, as it stood when the subpoena in this case was served, a delivery of a copy to the husband was good, where husband and wife were sued together; but the rule was amended in this court in 1874, so as to require a personal service on each defendant, or by leaving a copy for each at his or her usual place of abode, with some adult member of the family. The service in the present case would not now be good, though it must be held to have been so at the time it was made.

It would be very strange if a decree obtained under such circumstances could stand the test of a critical examination. We are of the opinion that there are several errors sufficient to justify its reversal.

1. It was the duty of the court, where the bill on its face showed that the party whose interest was the principal one to be affected by the decree was both a minor and a *feme covert*, and that no one appeared for her in any manner to protect her interests, to have appointed a guardian *ad litem* for that purpose. If neither her husband nor he who is styled her guardian in the bill appeared to defend her interest, it was the more imperative that the court should have appointed some one to do it. There is no evidence in the record except the statement in the bill that Dr. Barr was her guardian. If he was not, then there was no one served with notice whose legal duty it was to defend her. If he was her guardian there is no evidence of the precise nature of his duties or power, as there are several classes of guardians. As to the particular property now in contest, she had a trustee, in whom the title was vested for her use, and whose duty it would have been to protect her interest in it: but, strangely enough, he was not made a party. It was therefore error in the court to proceed to a decree without appointing a guardian *ad litem*. 1 Daniell's Ch. Pr., 160, c. 4, sec. 9; Coughlin's Heirs *v.* Brent, 1 McLean, 175; Lessee of Nelson *v.* Moore, 3, *id.*, 321.

2. If Mrs. O'Hara had been under no disability, it was error to have entered a final decree for want of appearance on the return day of the writ, or during that term.

"According to the practice of the English chancery court," says Mr. Justice Washington, in *Pendleton v. Evans* Ex'r., 4 Wash. C. C., 337, "a bill cannot be taken *pro confesso* after service of subpoena, and even after appearance, until all the processes of contempt to sequestration have been exhausted: after which the bill is taken *pro confesso*, and a decree passes which is absolute in the first instance." He then comments on the practice of the New York chancery court, which, instead of a proceeding in contempt, required a rule to answer to be served on the defendant, and if this was not obeyed the bill might be then taken *pro confesso*. He then adds: "The principle which governs the practice in both these courts is, that the defendant shall not be taken by surprise, but shall have sufficient warning before a decree is entered against him by default."

He then states the rules adopted by the supreme court for the federal courts, as follows: "If the answer, the subpoena being returned executed, be not filed within three months after the day of appearance and bill filed, then defendant is

to be ruled to answer, and, failing to do so, the bill may be taken for confessed, and the matter thereof decreed immediately; but this decree is only nisi, to be made absolute at the term succeeding that to which service of a copy of the decree shall be returned executed, unless cause to the contrary be shown."

And in the case of *Read v. Consequa*, 4 Wash. C. C. 180, where a bill on which an injunction had been allowed had remained unanswered, and without appearance of defendant, who had been duly served five years before, he refused to grant an order taking the bill *pro confesso* because it would be irregular.

What a contrast to the speed with which the decree was entered in the case before us.

Rules 18 and 19 of the equity practice as now existing have modified those which are mentioned by Judge Washington, and, unless the defendant demur, plead or answer, on or before the rule day next succeeding his appearance, the plaintiff may enter an order in the order book that the bill be taken *pro confesso*, and the matter thereof decreed at the next succeeding term. But in the case before us the final decree was entered on the day fixed for appearance, or, at most, at the same term.

The standing rule now requires defendant to plead by the next rule day after appearance, which is the same as if a special rule were taken on him to do so.

It is therefore clear that final decree could not be made even under the present rules, until the term of court next succeeding the day of default.

The remarks of Mr. Justice Washington show that these rules are not merely technical and arbitrary, but are made to prevent a defendant from losing his rights by surprise.

3. The legal title to the property in question was held by Fetterman, in trust for Mrs. O'Hara. The trust was not a naked or dry trust; for he was empowered with her consent to sell it, and reinvest the proceeds on the same trusts, or to mortgage it, and with the money so raised purchase other real estate.

How the decree can clear the property of this trust without having the trustee before the court is difficult to see. This was the object of the suit; but how can it be made effectual for that purpose in the absence of the person in whom the title is vested? We think, that in a case like this, where a woman

under the double disability of coverture and infancy, has a trustee in whom the title of the controversy is vested for her use, the court should have refused a decree until he was made a party.

It is said, that, after making the deed that the court ordered, the appellant is bound by it, and cannot now prosecute this appeal. The principle is unsound. The deed recites on its face that it is made under the order of the court. The parties must have either obeyed the order of the court, or taken appeal and given a supersedeas bond in a sum so large that they were probably unable to do it. "In no instance within our knowledge," says the court, in *Erwin v. Lowry*, 7 How. 184, "has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree."

If the judgment is reversed, it is the duty of the court to restore the parties to their rights. That was a case where the appellant received the money which by the decree he recovered of the appellee, and is, therefore, a stronger case than the present, as his action would seem to ratify the decree.

About three years after this decree, appellants filed a petition in the Circuit Court in the nature of a bill of review to set it aside. To this petition the appellees filed an answer, in which, among other matters, they set out a copy of another deed made by O'Hara and wife the day after (as they allege) Mrs. O'Hara became of age, and they rely on that deed here as a bar to the appeal.

It is sufficient now to say, as to that deed, that it is long subsequent to the decree, and apart from it. Its validity and force must stand or fall on its own merits, wherever and whenever they may be tried, in any issue made on them. It has nothing to do with the appeal which regards the errors of the decree, and which the appellant has a right to have reversed. When this is done, and she is placed where she ought to be in that regard, the effect of the deed now under consideration may, perhaps, be decided on a supplemental bill, setting it up as a matter occurring since the commencement of the suit, or by the appellees dismissing their present suit and relying on the title acquired by that deed.

Another equally conclusive reason why we cannot consider any other matters arising under the petition and answer is,

that there is no order, decree or other action of the court on them. The record closes with the bill and answer, the latter filed May 23, 1874, and the present appeal allowed August 4, 1874.

We, therefore, take no notice of this subsequent pleading, but reverse the original decree, and remand the case to the Circuit Court for such further proceeding as to right and justice may appertain.

Decree reversed.

CHAPTER VI.

APPEARANCE AND PROCEEDINGS ON BEHALF OF DEFENDANT.

Rule 17.

The appearance-day of the defendant shall be the rule-day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

Rule 18.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed: or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged

therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

Rule 40.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

DECEMBER TERM, 1850.

Ordered, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

Rule 44.

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

Rule 46.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental

answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

Rule 25.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

Rule 26.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recital of deeds, documents, contracts, or other instruments, in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

Rule 27.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or

before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.

Rule 32.

The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

Rule 33.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. Thus, for example, a *bona-fide* purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall

not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

Rule 52.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following (that is to say): "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

Rule 53.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

Rule 59.

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a state or territory, or before any notary public.

Rule 41.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

DECEMBER TERM, 1871.

Amendment to 41st Equity Rule.

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864.

Rule 36.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

Rule 37.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

Rule 31.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant ; that it is not interposed for delay ; and, if a plea, that it is true in point of fact.

LANGDON *v.* GODDARD.

(Circuit Court for New Hampshire : 3 Story, 13-25. 1843.)

STATEMENT OF FACTS.—This cause was heard upon exceptions to the answer of defendant Goddard to complainants' bill. The first exception was that a certain allegation on the ninth page of the answer was impertinent, and should be stricken out. The allegation in question was to the effect that the testatrix, Elizabeth Sewall, executed a codicil to her will on August 21, 1838, being moved thereto by the importunities of complainants, and charging the complainants with, in effect, dictating the codicil. The will and codicil in question had, prior to the filing of the answer, been duly admitted to probate by the proper court. The second exception was to a statement that he, defendant, had sought to procure Mr. Emerson to effect a settlement of the disputes between him and complainants, and that he and Emerson had agreed upon terms, to which, however, complainants would not afterwards adhere. This statement, it was insisted, was impertinent.

The third exception was that defendant had not, to the best of his knowledge and belief, answered a certain interrogatory of plaintiffs.

Opinion by STORY, J.

I am of opinion that all the exceptions to the answer are well taken, and ought to be allowed. The first exception turns upon the allegations in the answer therein referred to, by which an attempt is made by a side wind to impeach the

bona fides and due execution of the codicil to the will of Mrs. Sewall, and by implication to insinuate that it was procured by fraud and imposition. Now, it is well known that the courts of probate have a full and exclusive jurisdiction, as well in New Hampshire as in Maine, over the probate of wills, and that their decree, affirming the validity of a will or codicil, and allowing the same, is conclusive upon the subject-matter, and is not re-examinable elsewhere. The present codicil has been duly admitted and allowed by the probate courts of both states. The allegation of the answer here excepted to is, therefore, at once impertinent and immaterial, and endeavors to cast a shade upon the transaction, which is not justifiable or excusable. It is not a matter which can be filed in controversy in the present suit, or admitted to proof.

The second exception is to the allegation in the answer setting up an attempted settlement and arrangement, of the nature and terms of which no account is given, by the defendant with the plaintiffs, through the means of a professional friend, which was not accepted or adhered to by the plaintiffs, and therefore failed of its purpose. What is this but to stuff the answer with immaterial and impertinent suggestions for the purpose of giving a false gloss and coloring to the controversy? Besides, as the nature and terms of the proffered settlement and arrangement are nowhere stated, it is impossible for the court to see what possible bearing it could properly have upon the cause.

The third exception is the insufficiency of the answer to the eighth interrogatory propounded by the bill, and states the very words of that interrogatory. That interrogatory undoubtedly was intended to refer to the following allegation in the bill, viz.: "Your orators further say that thereafterwards the said Elizabeth frequently called upon the said Goddard to refund to her the amount of the said notes so sold by her to him, or return the same, and that the said Goddard repeatedly promised so to do. That on the 20th day of August, 1838, the said William Goddard prepared with his own hand an instrument purporting to be a codicil to the will of said Elizabeth, and procured the said Elizabeth to sign the same, therein and thereby bequeathing to him the aforesaid notes of Floyd and Harris, and also all sums of money due from him to the said Elizabeth, which codicil was so signed by the said Elizabeth by inducement of the said Goddard, and by reason

of the confidence subsisting between the said Elizabeth and the said Goddard, and was thereafterward revoked by the said Elizabeth, which codicil was, after its execution, carried away by the said William, and is now in his possession." It is certainly not as pointed, full and precise as it ought to be to meet all the stress of the allegations of the bill. It does not interrogate as to the present possession by the defendant of that codicil, or as to what has become of it, and when he last saw it, and what were the exact purport and words thereof; nor does it call upon the defendant to produce it. Still, however, it is sufficient to call upon the defendant for a fair and full answer to the plain import and objects thereof. I cannot but consider the answer put in to this point as inexplicit and evasive, if it does not deserve the stronger imputation of being disingenuous. I shall therefore direct that the defendant put in a more full and direct answer to the interrogatory and allegation in the bill, applicable thereto, so that the justice of the case may on this point be fully presented to the court. I shall also give leave to the plaintiff to put additional interrogatories to the defendant applicable to this same allegation, so as to compel a direct and positive disclosure of the facts appertaining thereto. The defendant is to pay the costs of the hearing upon and allowance of these exceptions, which I shall direct to be taxed at \$10.

LIVINGSTON *v.* STORY.

(9 Peters, 632-662. 1835.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—The appellant, Edward Livingston, filed his bill of complaint in the district court of the United States for the eastern district of Louisiana, against the appellee, Benjamin Story, to set aside a conveyance made by him of certain lots of land in the city of New Orleans, and to be restored to the possession of said lots, alleging that the deed was given on a contract for the loan of money. Although in the form of a sale, it was in reality a pledge for the repayment of the money loaned, and calling for an account of the rents and profits of the property.

To this bill the defendant demurred, and the court sustained the demurrer and dismissed the complainant's bill, and the cause comes into this court on appeal. It will be enough, for

the purpose of disposing of the questions which have been made in this case, to state only some of the leading facts which are set forth and stated in the bill.

The bill alleges that on or about the 25th of July, 1832, the defendant and John A. Fort loaned to him, the complainant, the sum of \$22,936, to secure the payment of which, with interest at the rate of eighteen per cent. per annum, he conveyed to them a lot of ground in New Orleans with the buildings and improvements thereon. That a counter letter or instrument was, at the same time, executed by the other parties, by which they stipulated to reconvey the property on certain conditions. That the lot was covered with fifteen stores in an unfinished state, and the object of the loan was to complete them. The property is stated to have been worth at that time \$60,000, and is now worth double that sum. That the complainant, soon after the said transaction, left New Orleans, where he then resided, on a visit to the state of New York, expecting that during his absence some of the stores would have been finished, or in a state to let. That, on his return, he found that Story and Fort had paid \$8,000 to a contractor, who had failed to finish the buildings, the rent of each of the three smallest of which would be the interest of \$10,000 a year, when finished. A further time was requested for the payment of the money, which Story and Fort would not agree to, but upon condition that the property should be advertised for sale on a certain day named; that the sum due should be increased from \$25,000 to \$27,000, which sum was made up by adding to the \$25,000 the following sums: \$1,500 for interest for the delay of four months, at eighteen per cent., \$800 for auctioneer's commissions, \$50 for advertising, and \$200 arbitrarily added without any designation; and that he, the complainant, should annul the counter letter given to him by Story and Fort. That the complainant, being entirely at the mercy of the said Story and Fort, consented to these terms, in hopes of being able to relieve himself before the day fixed for the sale of his property; but being disappointed, he was on that day, in order to obtain a delay of sixty days, forced to consent to sign a paper, by which it was agreed that the debt should be augmented to the sum of \$27,830, and that if the same was not paid at the expiration of the sixty days, the property should belong to the said Fort and Story without any sale. The bill contains some other allegations of hardship

and oppression, and alleges that the rents and profits of the property received by Fort and Story in the lifetime of Fort, and by Story since the death of Fort, amount, at least, to \$60,000. The bill then prays that the said Benjamin Story may be cited to appear to the bill of complaint, and answer the interrogatories therein propounded.

The defendant in the court below demurs to the whole bill, and for cause shows that the complainant has not by his said bill made such a case as entitles him, in a court of equity in this state, to any discovery from this defendant, touching the matters contained in the said bill, or any or either of such matters, nor to entitle the said complainant to any relief in this court, touching any of the matters therein complained of. The want of proper parties is also assigned for cause of demurrer.

The court below did not notice the want of parties, but sustained the demurrer on the other causes assigned.

The argument addressed to this court has been confined principally to the general question whether the district court of the United States, in Louisiana, has equity powers; and, if so, what are the modes of proceeding in the exercise of such powers. The great earnestness with which this power has been denied at the bar to the district court may make it proper briefly to state the origin of the district court of that state, and the jurisdiction conferred upon it by the laws of the United States. When the constitution was adopted, and the courts of the Union organized, and their jurisdiction distributed, Louisiana formed no part of this Union. It is not reasonable, therefore, to conclude that any phraseology has been adopted with a view to the peculiar local system of laws in that state. She was admitted into the Union in the year 1812; and, by the act of congress (2 Stats. at Large, 701), passed for that purpose (4 Laws U. S., 402), it is declared that there shall be established a district court, to consist of one judge, to be called the district judge, who shall, in all things, have and exercise the same jurisdiction and powers, which, by the act, the title whereof is in this section recited, were given to the district judge of the territory of Orleans. By the act here referred to for the jurisdiction and powers of the court (2 Stats. at Large, 283; 3 Laws U. S., 606), a district court is established to consist of one judge; and it declares that he shall, in all things, have and exercise the same jurisdiction

and powers which are by law given to, or may be exercised by the judge of the Kentucky district. And, by the judiciary act of 1789 (1 Stats. at Large, 73; 2 Laws U. S., 60), it is declared that the district court in Kentucky shall, besides the jurisdiction given to other district courts, have jurisdiction of all other causes, except of appeals and writs of error, hereinafter made cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court. And such manner of proceeding is pointed out by the process act of 1792 (1 Stats. at Large, 275; 2 Laws U. S., 299), which declares that the modes of proceeding in suits of common law shall be the same as are now used in the said courts respectively, in pursuance of the act entitled "An act to regulate process in the courts of the United States;" namely, the same as are now used and allowed in the supreme courts of the respective states (2 Laws U. S., 72; 1 Stats. at Large, 93), and in suits of equity, and those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and courts of admiralty respectively, as contradistinguished from courts of common law; subject to such alteration by the courts as may be thought expedient, etc.

From this view of the acts of Congress it will be seen that, prior to the act of 1824, which will be noticed hereafter, Louisiana, when she came into the Union, had organized therein a district court of the United States, having the same jurisdiction, except as to appeals and writs of error, as the circuit courts of the United States in the other states. And that, in the modes of proceeding, that court was required to proceed according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law. And whether there were or not, in the several states, courts of equity proceeding according to such principles and usages made no difference, according to the construction uniformly adopted by this court.

In the case of *Robinson v. Campbell*, 3 Wheat., 222, it is said that, in some states in the Union, no court of chancery exists to administer equitable relief. In some of these states courts of law recognize and enforce, in suits at law, all equitable claims and rights which a court of equity would recognize and enforce; and in others all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law; and a construction, therefore, that would adopt the

state practice in all its extent would at once extinguish in such states the exercise of equitable jurisdiction. That the acts of congress have distinguished between remedies at common law and in equity, and that, to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be at common law or in equity, not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. So, also, in the case of the *United States v. Howland*, 4 Wheat., 114, the bill was filed on the equity side of the circuit court of the United States in Massachusetts, in which state there was no court of chancery; and, in answer to this objection, the court says: "As the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states."

That congress has the power to establish circuit and district courts in any and all the states, and confer on them equitable jurisdiction in cases coming within the constitution, cannot admit of a doubt. It falls within the express words of the constitution: "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish." Article 3.

And that the power to ordain and establish carries with it the power to prescribe and regulate the modes of proceeding in such courts admits of as little doubt. And, indeed, upon no other ground can the appellee in this case claim the benefit of the act of 1824. Session Laws, 56. The very title of that act is to regulate the mode of practice in the courts of the United States in the district of Louisiana; and it professes no more than to regulate the practice. It declares that the mode of proceeding in civil causes in the courts of the United States that now are or hereafter may be established in the state of Louisiana shall be conformable to the laws directing the mode of proceeding in the district courts of said state. And power is given to the judge of the United States court to make, by rule, such provisions as are necessary to adapt the laws of procedure in the state court to the organization of the courts of the United States, so as to avoid any discrepancy, if any such

should exist, between such state laws and the laws of the United States. The descriptive terms here used, civil actions, are broad enough to embrace cases at law and in equity; and may very fairly be construed as used in contradistinction to criminal causes. There are no restrictive or explanatory words employed, limiting the terms to actions at law. They apply equally to cases in equity; and if there are any laws in Louisiana directing the mode of procedure in equity causes, they are adopted by the act of 1824, and will govern the practice in the courts of the United States. But the question arises, What is to be done if there are no equity state courts, nor any laws regulating the practice in equity causes? This question would seem to be answered by the cases already referred to, of *Robinson v. Campbell*, 3 Wheat., 222, and *The United States v. Howland*, 4 Wheat., 114. And also by the case of *Parsons v. Bedford*, 3 Pet., 444. In the latter case the court say: "That the course of proceeding, under the state law of Louisiana, could not, of itself, have any intrinsic force or obligation in the courts of the United States organized in that state, except so far as the act of 1824 adopted the state practice; that no absolute repeal was intended of the antecedent modes of proceeding authorized in the courts of the United States under the former acts of congress."

If, then, as has been asserted at the bar, there are no equitable claims or rights recognized in that state, nor any courts of equity, nor state laws regulating the practice in equity causes, the law of 1824 does not apply to the case now before this court; and the district court was bound to adopt the antecedent mode of proceeding authorized under the former acts of congress; otherwise, as is said in the case of *Robinson v. Campbell*, the exercise of equitable jurisdiction would be extinguished in that state, because no equitable claims or rights which a court of equity would enforce are there recognized. And there being no court of equity in that state, does not prevent the exercise of equity jurisdiction in the courts of the United States, according to the doctrine of this court in the case of *The United States v. Howland*, which arose in the state of Massachusetts, where there are no equity state courts. We have not been referred to any state law of Louisiana, establishing any state practice in equity cases, nor to any rules adopted by the district judge in relation to such practice; and we have some reason to conclude that no such rules exist.

For, in a record now before us from that court, in the case of *Hiriart v. Ballou*, 9 Pet., 156, we find a set of rules purporting to have been adopted by the court on the 14th of December, 1829, with the following caption: "General rules for the government of the United States court in the eastern district of Louisiana in civil cases or suits at law as contradistinguished from admiralty and equity cases, and criminal prosecutions; made in pursuance of the seventeenth section of the judiciary act of 1789, and of the first section of the act of congress of the 26th of May, 1824, entitled, 'An act to regulate the mode of practice in the courts of the United States for the district of Louisiana.'" And all other rules are annulled; and these rules relate to suits at law and in admiralty only, and not to suits in equity. From which it is reasonable to infer that the district judge did not consider the act of 1824 as extending to suits in equity; and if so, it is very certain that the demurrer ought to have been overruled. For, according to the ordinary mode of proceeding in courts of equity, the matters stated in the bill are abundantly sufficient to entitle the complainant both to a discovery and relief; and by the demurrer, everything well set forth, and which was necessary to support the demand in the bill, must be taken to be true. 1 Ves. Sen., 426; 1 Ves. Jr., 289.

And if any part of the bill is good, and entitles the complainant either to relief or discovery, a demurrer to the whole bill cannot be sustained. It is an established and universal rule of pleading in chancery, that a defendant may meet a complainant's bill by several modes of defense. He may demur, answer, and plead to different parts of a bill. So that if a bill for discovery and relief contains proper matter for the one, and not for the other, the defendant should answer the proper and demur to the improper matter. But if he demurs to the whole bill, the demurrer must be overruled. 5 Johns. Ch., 186; 1 Johns. Cas., 433.

But if we test this bill by any law of Louisiana which has been shown at the bar, or that has fallen under our observation, the demurrer cannot be sustained. The objection founded on the alleged want of proper parties, because the heir and residuary legatee of John A. Fort is not made a party, is not well founded. The bill states that in the year 1828, after the death of Fort, the defendant, Benjamin Story, took the whole of the property, by some arrangement with the

heirs of Fort ; and that he ever since has been, and is now, in the sole possession thereof, and has received the rents and profits of the same. This fact the demurrer admits. Whereby Benjamin Story became the sole party in interest.

The causes of demurrer assigned are general ; that the complainant has not, by his bill, made such a case as entitles him, in a court of equity in that state, either to a discovery or relief. In the argument at the bar there has been no attempt to point out in what respect the bill is defective, either in form or substance, as to the discovery, if it is to be governed by the ordinary rules of pleading in a court of chancery. And if the objection rests upon the want of the right in the complainant to call upon the defendant for any discovery at all, the objection is not sustained even by the laws of Louisiana. But on the contrary, it is expressly provided by a law of that state, that when any plaintiff shall wish to obtain a discovery from the defendant, on oath, such plaintiff may insert in his petition pertinent interrogatories, and may call upon the defendant to answer them on oath ; and that the defendant shall distinctly answer to such interrogatories, provided they do not tend to charge him with any crime or offense against any penal law, neither of which has been pretended in this case. 2 Martin's Dig., 158.

Nor has it been attempted to point out in what respect the bill of complaint is defective, either in form or substance, as to the matters of relief prayed. In this respect also, the bill, according to the ordinary course of proceeding in a court of chancery, is unobjectionable ; and indeed would be amply sufficient in the state courts, under the law of Louisiana ; which declares that all suits in the supreme court shall be commenced by petition, addressed to the court, which shall state the names of the parties, their places of residence, and the cause of action, with the necessary circumstances of places and dates ; and shall conclude with a prayer for relief adapted to the circumstances of the case. 2 Martin's Dig., 148. These are the essential requisites in an ordinary bill in chancery. It can certainly not be pretended that it is any objection in the case before us that the bill filed is called a bill of complaint, instead of a petition.

The sufficiency of the objections, therefore, must turn upon the general question whether the district court of Louisiana has, by the constitution and laws of the United States, the

same equity powers as a circuit court of the United States has in the other states of the Union; and we think it has been already shown that it has; but that, according to the provisions of the act of 1824, the mode of proceeding in the exercise of such powers must be conformably to the laws directing the mode of practice in the district courts of that state, if any such exist; and according to such rules as may be established by the judge of the district court, under the authority of the act of 1824. And if no such laws and rules applicable to the case exist in the state of Louisiana, then such equity powers must be exercised according to the principles, rules and usages of the circuit courts of the United States, as regulated and prescribed for the circuit courts in the other states of the Union.

The decree of the district court must accordingly be reversed, and the cause sent back for further proceedings.

HAYES *v.* DAYTON.

(Circuit Court for New York: 18 Blatchford, 420-426. 1880.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—The bill in this case states that the plaintiff invented certain “improvements in ventilators, skylights, skylight turrets, conservatories and other glazed structures and ventilating louvres,” described in “several letters patent and re-issues thereof.” It then avers that he obtained six several patents, Nos. 94,203 and 100,143, and 106,157, and 112,594, and 143,149, and 143,153; that he obtained re-issues of all of them, the re-issues being six in number, one of each (though it does not appear of which original any particular re-issue is the re-issue), the re-issues being number 8,597 and 8,674, and 8,675, and 8,676, and 8,688, and 8,689; and that, since the re-issues, the defendant has, without authority, infringed said several re-issues, and made, used and sold said inventions. The bill interrogates the defendant as to whether he has made and sold “ventilators, skylights, skylight turrets, conservatories and other glazed structures and ventilating louvres, and embraced within any or either” of the said “several letters patent and re-issued letters patent;” also, in four several questions, as to whether he has made, sold or used what is claimed in each one of the four claims in re-issue No. 8,597, quoting it; and the like as to each one of fifteen claims in re-issue No. 8,674, and of seven claims in re-issue No. 8,675,

and of two claims in re-issue No. 8,676, and of seven claims in re-issue No. 8,688, and of three claims in re-issue No. 8,689, there being thirty-eight several claims thus inquired about. The bill prays for a recovery of the profits and damages from the said unlawful making, using and selling, by the defendants, of the said "improvements in ventilators, skylights, skylight turrets, conservatories and other glazed structures and ventilating louvres."

The defendant demurs to the whole bill, and in the demurrer shows, for cause of demurrer, "that it appears by the said bill that it is exhibited against this defendant for several and distinct matters and causes, in many whereof, as appears by said bill, the defendant is not in any manner interested or concerned, and which said several matters and causes are distinct and separate one from the other, and are not alleged in said bill to be conjointly infringed by said defendant. . . . By reason of the distinct matters therein contained, the complainant's bill is drawn out to considerable length, and the defendant is compelled to take a copy of the whole thereof, and, by joining distinct matters together, which do not depend on each other, in the said bill, the pleadings, orders and proceedings will, in the progress of the said suit, be intricate and prolix, and the defendant be put to unnecessary charges in taking copies of the same." The defendant, "not waiving his said demurrer, but relying thereon," has put in, simultaneously, an answer to the whole bill.

This demurrer does not use the word "multifarious." A bill is multifarious when it improperly unites in one bill, against one defendant, several matters perfectly distinct and unconnected, or when it demands several matters of a distinct and independent nature against several defendants in the same bill. The reason for the first case is that the defendant would be compelled to unite, in his answer and defense, different matters, wholly unconnected with each other, and thus the proofs applicable to each would be apt to be confounded with each other, and delays would be occasioned by waiting for the proofs respecting one of the matters, when the others might be fully ripe for hearing. The reason of the second case is, that each defendant would have an unnecessary burden of costs by the statement in the pleadings of the several claims of the other defendants, with which he has no connection. Story's Eq. Pl., § 271. The demurrer in this case is intended to be a demur-

rer for misjoining causes of suit against one defendant. Yet much of it is inapplicable to such a case, and is taken from a form which applies only to the case of a demurrer by one of two or more defendants who has no concern with causes of action stated against the other defendants, such a demurrer being really a demurrer for a misjoinder of parties. Story's Eq. Pl., § 530, and note 3, where is to be found the form improperly used in this case. Yet there seems to be enough left, after rejecting as surplusage the improper and unnecessary part, to raise the point intended. The demurrer, in regard to misjoining causes of suit against the defendant, substantially avers that the bill is brought for several matters and causes which are separate and distinct one from the other, and are not alleged to be conjointly infringed by the defendant. This means that the patents sued on are distinct one from the other, and that they are not alleged to be conjointly infringed in any one article which the defendant has made or used or sold. This averment of the demurrer is true.

Where there is a joinder of distinct claims between the same parties, it has never been held, as a general proposition, that they cannot be united, and that the bill is, of course, demurrable for that cause alone. Nor is there any positive, inflexible rule as to what, in the sense of courts of equity, constitutes a fatal multifariousness on demurrer. A sound discretion is always exercised in determining whether the subject-matters of the suit are properly joined or not. It is not very easy, *a priori*, to say exactly what is or what ought to be the true line regulating the course of pleading on this point. All that can be done in each particular case as it arises is to consider whether it comes nearer to the class of decisions where the objection is held to be fatal, or to the other class where it is held not to be fatal. In new cases the court is governed by those analogies which seem best founded in general convenience, and will best promote the due administration of justice, without multiplying unnecessary litigation on the one hand, or drawing suitors into needless and oppressive expenses on the other. Story's Eq. Pl., §§ 531, 539; Horman Patent Mfg. Co. v. Brooklyn City R. R. Co., 15 Blatch., 444.

We are not without cases on this subject, in suits on patents in this country. In *Nourse v. Allen*, 4 Blatch., 376, in 1859, before Mr. Justice Nelson, a bill on four patents was held good on demurrer, where it alleged that the machine used contained

all the improvements in all the patents. The court thought that the convenience of both parties as well as a saving of expense in the litigation seemed to be consulted in embracing all the patents in one suit in such a case; and that, although the defenses as respected the several improvements might be different and unconnected, yet the patents were connected with each other in each infringing machine.

In *Nellis v. McLanahan*, 6 Fish. Pat. Cas., 286, in 1873, before Judge McKennan, it was held that where a suit in equity is brought for the infringement of several patents for different improvements, not necessarily embodied in the construction and operation of any one machine, the bill must contain an explicit averment that the infringing machines contain all the improvements embraced in the several patents, or it will be held bad for multifariousness on demurrer.

In *Gillespie v. Cummings*, 3 Saw., 259, in 1874, before Judge Sawyer, the bill was founded on two patents for the manufacture of brooms. There was a demurrer on the ground of the joinder of two separate and distinct causes of action. It appearing by the bill that the defendant's broom, in infringing, must be an infringement of both of the patents, and that there was, therefore, a common point to be litigated, and much of the testimony must, from the nature of things, be applicable to both of the patents, the bill was held good.

In *Horman Patent Mfg. Co. v. Brooklyn City R. R. Co.*, 15 Blatch., 444, in 1879, before Judge Benedict, a bill in equity on two patents alleged that the defendant was using machines containing in one and the same apparatus the inventions secured by each of the two patents. It was demurred to on the ground that it did not allege that the devices were used conjointly or connected together in any one apparatus, but the demurrer was overruled. The court held that, as the bill did not show the controversy to be of such a character that prejudice to the defendant would result from the joinder in one action of the causes of action joined, the bill must be sustained. The court was of opinion that, in the absence of any other fact, the circumstance that the two transactions complained of were the use, in a single machine, of two patented devices connected with the mechanism of the machine, warranted the inference that no prejudice would result to the defendant from the joinder of the two transactions.

The decisions above cited all tend in one direction. The

decision in *Case v. Redfield*, 4 McLean, 526, if limited, as it apparently ought to be, to the case of an original patent, and of another patent granted in terms as an improvement on the original patent, is not like the present case as shown by the bill. It is a case difficult to understand, and if it were like the present case in its facts, whatever there is in the decision of it tending to sustain the bill in this case is opposed to all the other cases on the subject.

The present case appears to be a suit on thirty-eight claims in six different patents. There is nothing to show that any two or more of the patents are in fact, or are capable of being, used in making a single structure, much less that the defendant has so used them. So far as the bill shows, the causes of action are as distinct as the patents. The patents are not shown to be connected with each other in any infringing machine, or to be used at the same time in any infringing machine. The controversy in this suit appears, from the bill, to be of such a character that prejudice will result to the defendant from being called upon to defend in one suit against thirty-eight claims in six different patents, no two of which claims, so far as the bill shows to the contrary, are employed in any one machine. On this ground the bill must be held bad.

The plaintiff contends that the putting in of an answer to the whole bill is a waiver of the demurrer. Rule 32 in equity permits a demurrer to a part of a bill, a plea to a part, and an answer as to the residue. If, impliedly, that rule forbids a demurrer to the whole bill, and at the same time an answer to the whole bill, the plaintiff's remedy is by moving to strike out either the answer or the demurrer, or to compel the defendant to elect which he will abide by. By going to argument on the demurrer the plaintiff waives the benefit of the objection now taken, if otherwise he would have it. Moreover, rule 37 in equity provides that "no demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea." This rule was first made in March, 1842, to take effect August 1, 1842. 17 Pet., lxvii. There was no such rule in the prior rules of March, 1822 (7 Wheat., v), although rule 18 in such prior rules was the same as the above present rule 32. Under the rules of 1822, not only had it been held (*Ferguson v.*

O'Harra, Pet. C. C. 193) that, where there was a plea going to the whole bill and also an answer to the whole bill, the court would, on the plaintiff's motion, disallow the plea, on the ground of its being overruled by the answer, but Judge Story had held in 1840, in *Stearns v. Page*, 1 Story, 204, that where a plea stated a ground why the defendant should not go into a full defense, and yet the defendant answered putting in a full defense, it would be held, on the argument of the plea, that the answer overruled the plea. Then rule 37 was made. It applies to the present case. The demurrer is allowed, with costs.

ATWILL v. FERRETT.

(Circuit Court for New York: 2 Blatchford, 39-49. 1846.)

STATEMENT OF FACTS.—“The Bohemian Girl,” an opera, was reproduced in New York by Atwill, who added much matter to it, interspersed throughout the work. He made many alterations, changing duets to solos, trios to duets, and published and caused to be produced in New York, in December, 1844, the opera thus altered, and, as he alleges, improved, and duly copyrighted the same. His bill charges that Ferrett & Co., a firm composed of Ferrett and Arthur, of Philadelphia, and Galusha, of New York, infringed his copyright, and he brought an action at law in New York against Galusha, the only one of the firm residing in New York, and files this bill for a discovery from him and his partners, which discovery he alleges he is entitled to, and without which he cannot safely try the cause.

Opinion by BETTS, J.

Three separate demurrers are filed to the bill in this case by the defendant Galusha. The other two defendants have not entered their appearance, and it does not appear that they have been served with the subpoena.

The defendant attempts to call in question distinct parts of the bill by severing his demurrers, and also takes objection to the whole by general demurrer. The special causes of demurrer are excepted to by the plaintiff as informal and insufficient, in not pointing out precisely the parts of the bill intended to be embraced by them. They adopt the general formulary, “that, as to so much of the bill as seeks,” etc., without specifying by paragraph, page or folio, or other method of reference,

where the objectionable matter is to be found. We think this mode of demurring to the statements of a long and involved bill is too obscure and indefinite to be admissible. Mitford's Pl., 214; *Robinson v. Thompson*, 2 Ves. & B., 118; *Weatherhead v. Blackburn*, id., 121. The business of a special demurrer is to point out, by the clearest indications, the features alleged to be defective in the pleading, and to relieve the court from the labor and delay incurred by repeated searches for the parts to which the demurrer may apply. Story's Eq. Pl., §§ 457-459; *Devonsher v. Newenham*, 2 Schoales & Lefroy, 199. In the present case the court have abridged the bill paragraph by paragraph, and in that way have been enabled to select various statements which were undoubtedly intended to be embraced by the special demurrers; but we are not inclined to sanction so loose a mode of pleading. We therefore hold the special demurrers to be informal and insufficient, except in respect to the multifariousness of the bill, and to its demand of discoveries involving penalties and forfeitures against the defendant. In those particulars we think that the causes of demurrer assigned designate, with sufficient explicitness, the parts of the bill to which they are intended to apply.

(1) The bill is objected to as multifarious by the defendant Galusha, on the ground that it makes charges against and exacts answers from his co-defendants in regard to matters involved in the suit at law commenced against him, which do not concern them, they not being parties to the suit at law. But the matters referred to concern him, and he cannot make the objection of irrelevancy in respect to his co-defendants, more especially as it appears on the face of the bill that they reside out of the jurisdiction of the court. Story's Eq. Pl., § 544, note 3. Another feature of the bill might also probably rescue it from this objection, inasmuch as it charges the acts complained of to have been committed by the three defendants as partners and in their co-partnership character, provided they are all connected by other proper allegations with the object and purpose of the discovery prayed for. Mitford's pl., 182, 183. The demurrer for multifariousness is overruled.

(2) It is an incontrovertible principle of equity law that a defendant cannot be compelled to make discoveries in answer to a bill which seeks to enforce penalties and forfeitures against him by means of such discoveries. Story's Eq. Pl., § 521,

note 3, and §§ 522, 575, 598; Mitford's Pl., 194-197. In this case the bill claims a forfeiture under section 7 of the act of February 3, 1831 (4 U. S. Stat. at Large, 438), of the plates and pieces of music on hand. Had the forfeiture been waived by the plaintiff, the defendants might be compelled to disclose the number of their publications, the quantity on hand and the amount realized from sales, in aid of the recovery of damages in a suit at law. So, probably, on such discovery equity might compel the defendants to deliver up to the plaintiffs the forfeited copies. But the bill is clearly faulty in directly requiring the defendants to convict themselves of the act which carries with it the forfeiture sued for.

The decision of these two points leaves untouched, however, the principal features of the bill which are supposed to be brought in question by the demurrers, and to the discussion of which the argument was mainly directed; and it therefore remains to be considered whether advantage can be taken of those matters by general demurrer.

The objections which may be taken on general demurrer are: 1. That the plaintiff sets forth no title in himself to the subject-matter of his alleged copyright; and 2. That the bill lays no legal foundation for the discovery sought.

1. The insufficiency of the plaintiff's title on the face of the bill is claimed to be this: that he alleges the musical composition, or considerable portions of it, to have been arranged, adapted, printed and published *by or for* him, instead of averring that it was composed *by* him-self. The plaintiff, on the other hand, contends that, even admitting this to be so, his title is complete upon the legal adage, *qui facit per alium facit per se*, and that he can appropriate as his own the alterations and improvements of the music made by others at his procurement and for him.

The act of congress (4 U. S. Stat. at Large, 436, § 4) secures by copyright to any person who is *the author of any musical composition* the exclusive property in his composition for a term of years. The statute contains a more detailed description of the subjects of copyright than is given in the English acts of 8 Anne and 54 George 3 (Godson on Pat., App., 384 and 422); but the construction given to those acts by the English courts makes them include, under the name of *books*, pieces of music, etc. So that our system has no broader operation in this respect than the English, and no doubt a just

construction of both statutes will render their provisions concurrent. The counsel for the plaintiff insists that the doctrine of the English law enables a man to secure to himself as his own composition whatever he has had prepared for him by the labors of others. We think, however, that the cases of *Tonson v. Walker*, 3 Swanst., 672, 680; *Nicoll v. Stockdale*, id., 687; *Cary v. Longman*, 3 Esp., 273, 274, and *Mawmann v. Tegg*, 2 Russ., 385, rest upon wholly different principles. They recognize the right of authorship, although the *materials* of the composition were procured by another, and also an equitable title in one person to the labors of another when the relations of the parties are such that the former is entitled to an assignment of the production. But, to constitute one an author, he must, by his own intellectual labor applied to the materials of his composition, produce an arrangement or compilation new in itself. *Gray v. Russell*, 1 Story, 11. And the rules of the common law and of equity are the same upon this subject. *Cary v. Longman*, 1 East, 358; *Sayre v. Moore*, id., 361, note; *Jeremy's Eq.*, 322. The title to road-books, maps, etc., rests upon this principle (2 Story's Eq. Jur., § 940); and the cases cited by the plaintiff's counsel have relation to new productions arranged or compiled from materials before known or obtained by others for the author, and not to the appropriation by copyright of those materials in the same state in which they are furnished.

If, therefore, the plaintiff's title rested only upon the allegation referred to, we should hold the bill to be defective on general demurrer. But we find repeated averments in the bill to the effect that "he made many alterations of and additions to the said music"—that "he added new matters of his own, not in the original opera"—that he affixed a copy of the record on the title-page "of each piece of music composed, arranged and adapted by him for publication"—and that a copyright was taken out for such pieces "as arranged, adapted and published by the plaintiff, with the new titles and original matter introduced therein by him," whereby he became entitled to vend the music "as arranged and adapted by him, and to the original matter introduced by him therein;" and the bill charges the defendants with having sold such music "printed from and in exact imitation of the music so arranged and adapted and published by the plaintiff, with the original matter introduced therein by him, and with his titles to some

of such pieces of music." These allegations amount to an assertion of authorship in terms sufficiently explicit and full to constitute a perfect title at law, and, the facts being admitted by the demurrer, we must hold the right of the plaintiff established upon these averments, notwithstanding their defectiveness and their inconsistency with others contained in the bill. Mitford's Pl., 212. Such imperfect pleading is matter of form and can be taken advantage of only by special demurrer. The general demurrer in this behalf, must, therefore, be overruled. *Verplank v. Caines*, 1 Johns. Ch., 57; *Higinbotham v. Burnet*, 5 id., 184; *Kuypers v. The Reformed Dutch Church*, 6 Paige, 570.

2. The discovery prayed for is to aid the plaintiff in his suit at law prosecuted against the defendant Galusha, and the averment in the bill is that he has commenced an action of *trespass* against that defendant for the violation of his copyright. The demurrer raises the question whether the bill alleges such a suit at law as will afford foundation for the discovery sought, no relief consequent on the discovery being prayed for. It is clear that the plaintiff has adopted a form of action at law which cannot be supported. The English statute of 54 George 3, section 2, gives specifically an action on the case as the remedy for the violation of a copyright. Our act (4 U. S. Stat. at Large, 438) only indicates the form of action when a manuscript is published without the consent of the author (§ 9), or when a suit is brought to recover the pecuniary penalty given by the sixth section. On general principles of law, however, it is clear that *trespass* cannot be brought for an injury merely consequential in its character, unaccompanied by force as against the person or property, or by wrongful intermeddling with the possession of property. 1 Chitty's Pl., 126, 127. The act of 8 Anne, chapter 19, did not designate the form of action, yet no doubt was ever expressed that *case* was the appropriate one. *Beckford v. Hood*, 7 T. R., 616; *Cary v. Longman*, 1 East, 358; *Roworth v. Wilkes*, 1 Campb., 94.

To obtain a discovery in aid of a suit at law the bill must show it to be necessary for the plaintiff, and that, when made, it can be used to his advantage. Jeremy's Eq., 161; Story's Eq. Pl., §§ 319, 321. It necessarily follows, from these principles, that a discovery will not be decreed in aid of an action at law, where it is manifest that the plaintiff cannot avail himself of it in the suit he is attempting to prosecute. It is,

perhaps, also to be regarded as a substantive defect in the bill that it seeks a discovery from three defendants to aid a suit instituted against one alone. In so far, then, as the maintenance of the bill depends upon the plaintiff's right to a discovery, we think it defective in substance, and bad on general demurrer.

This bill, however, prays for an injunction, and, making title on its face in the plaintiff to the copyright set forth, and showing a wrongful and wilful violation of the copyright by the defendants, and serious injuries inflicted by and apprehended from such violation, it is sufficient in substance and form to entitle the plaintiff to an injunction. This relief is not dependent upon the discovery prayed, but rests on the equities set forth in the bill, and may be refused or granted irrespective of the discovery. A general demurrer to the whole bill takes exception, therefore, to this branch of it, and the principle of equity pleading is universal that a general demurrer to the whole bill must be overruled if any independent part of the bill is sufficient. *Higinbotham v. Burnet*, 5 Johns. Ch. R., 184; *Kuypers v. The Reformed Dutch Church*, 6 Paige, 570; *Story's Eq. Pl.*, § 443. The formal protestation accompanying the demurrer is of no avail to protect it against this defect, as it cannot serve the purpose of a plea or answer, or form an excuse for not putting in the one or the other. *Story's Eq. Pl.*, §§ 452, 457, 458. We think, therefore, that the general demurrer must be overruled on both points.

As faults in pleading have occurred on both sides, each party may amend without paying costs to the other.

BRANDON MANUFACTURING COMPANY *v.* PRIME.

(Circuit Court for New York : 14 Blatchford, 371-375. 1878.)

Opinion by WHEELER, J.

STATEMENT OF FACTS.—This cause has been heard on the several demurrer of defendant Strong, and joint demurrer of defendants Prime, Meacham and Luce to the cross-bill. The causes of demurrer assigned are the same in each. They are, in substance, that this court has not jurisdiction, because the court of chancery of the state had acquired prior jurisdiction on a bill brought by the orator in the cross-bill, there, for the same relief; that some of the relief prayed is not cognizable in equity; that some of the subjects of the cross-bill are

not the same as those of the original bill; and that Strong and another, made parties to the cross-bill, were not parties to the original bill. Both are demurrers to the whole bill.

The orators in the original bill commenced the litigation involved in this court, and compelled the orator in the cross-bill to come here and join in it. Having brought it here, they have no right to say that the whole or any part of it belongs anywhere else. If the cross-bill is appropriate to the original, it must relate to the subjects of it and embrace a part, at least, of the litigation introduced by it, so that by filing the cross-bill the orator in that has merely met those in the original where called upon by them to meet them. For this reason a plea of jurisdiction in another court is not a good plea to a cross-bill. 2 Dan. Ch. Pr. (4th Am. ed.), 636; Wel-ford's Eq. Pl., 229; *Ld. Newburg v. Wren*, 1 Vern., 220. And for the same reason it is not necessary to show, in a proper cross-bill, that the relief sought by it is cognizable in equity. Story's Eq. Pl., § 399.

It has not been claimed in argument, and could not successfully be claimed, but that this cross-bill relates to the subject of the original in some respects, nor but that some of the relief prayed in the cross-bill is properly prayed. And it follows that some of it is proper to be answered, in some form, by some of the parties; and that some of it may not be is no good reason for not answering what should be answered. As the demurrers are to the whole, and a part clearly should be answered, and the demurrers must be overruled or sustained as a whole, as to the causes relating to jurisdiction and relief, they must be overruled.

So far as the defendants Prime, Meacham and Luce are concerned, it would be sufficient to say, as to the other causes of demurrer, that, because other parties are improperly called upon to answer the cross-bill in this form, it is no good reason why they, who are properly called upon to answer it, should not do so. But if the others are properly called upon to answer it, *a fortiori*, they are and should answer it.

The question hereupon is merely whether the cross-bill should be answered at all or not by these other parties. That depends, of course, upon whether the subjects of it are so presented here by it that they are properly called upon to answer it in the form in which they are presented. The original bill sets forth, in substance, that the orators in that have a patent

that the orator in the cross-bill is infringing, and prays appropriate relief. The cross-bill sets forth that the defendant Strong had the record title to the patent, and the orator the equitable title to it, and that the orators in the original bill acquired Strong's title with notice of the outstanding equity, and were endeavoring to assert it against the equitable title, and prays restraint and a conveyance. It is unquestionably the proper office of a cross-bill to afford relief in such a case if the case is made out. Story, Eq. Pl., § 391; *Calverley v. Williams*, 1 Ves. Jr., 210. A cross-bill is like an original bill, except that it must rest on what is necessary to the defense of an original bill. In an original bill, brought by the orator in the cross-bill for the same relief, there could be no fair question but that these new parties, of whom Strong is one, would be proper parties. In this original bill, as it is framed, these do not appear to be necessary parties, but when the facts set up in the cross-bill appear they become so. Following the ordinary rule, when the orator in the cross-bill resorts to it for defense and relief, and makes it appear that they are not only proper but necessary parties to the litigation, that orator not only might, but ought, to make them parties. If there were no authorities and was no practice on the subject, on principle that would seem to be the proper course. That the practice in this state, which professes to follow the English chancery practice, the same that is followed in this court would warrant making him a party, is well known and appears in the state reports. *Blodgett v. Hobart*, 18 Vt., 414. It does not appear expressly from such English reports or text-books as have been examined what the actual practice in such cases there has been. In this country, in *Curd v. Lewis*, 1 Dana, 351, a decree was reversed for the reason that an assignor of the subject of litigation in an original and cross-bill was not a party to either, and should have been made a party to the cross-bill, and that he might be made such a party. *Wickliffe v. Clay*, id., 585, was heard by consent only, without making a party, that by the cross-bill appeared necessary, a new party by the cross-bill. In *Sharp v. Pike*, 5 B. Mon., 155, a new party was added by cross-bill against his own express objection. In *Walker v. Brungard*, 13 S. & M., 723, new parties were added and new matters brought in by cross-bill and heard without objection. In disposing of the case, the chancellor, delivering the opinion of the court, said that, if they had been objected

to, the new matters would all have been kept out, without saying that the new parties would have been. In *Costers v. Bank of Georgia*, 24 Ala., 37, it was expressly held that new parties should be added by cross-bill, when so interested in the litigation involved by it as to be proper parties to it.

Opposed to all this, there is the remark of Mr. Justice Curtis in *Shields v. Barrow*, 17 How., 130, and the reasons given by him in support of it, to the effect that new parties cannot in any case properly be added by cross-bill, without citing any authority for it, and books and cases that have followed that remark without citing any other authority. That precise question was not involved in that case, but the mere *dictum* of such a judge of such a court would ordinarily be followed, especially by lower courts. An examination of his reasoning shows that he made the suggestion without much examination, probably, and his reasoning does not cover the whole ground as to all classes of cases. The modes of procedure he suggests would probably be ample in all cases of cross-bills brought for discovery in aid of a defense merely to the original bill, but not in cases of those brought for relief as well as defense, where new parties would be necessary to the relief sought. As in this case, the methods he states as the proper ones, if successfully followed, would enable the defendant in the original bill to defeat the orator therein, but not to reach the affirmative relief prayed in the cross-bill, if entitled to it. Weighty as that remark is, it is not thought to be sufficient to control the reasons and authority to the contrary of it. The result of what is thought to be the soundest reasoning and the best considered authorities is that, where a cross-bill shows that there is a party to the subjects of the litigation as presented by it, who has not before been made a party nor appeared to be a necessary one, and then does appear to be such, that party should be brought in by the cross-bill.

The result is that this cross-bill should be answered by all those made defendants to it. The demurrers are overruled, and it is thereupon ordered that the defendants to the cross-bill answer over.

BAILEY v. WRIGHT.

(Circuit Court for Ohio : 2 Bond, 181-183. 1868.)

Opinion of the Court.

STATEMENT OF FACTS.—The bill in this case alleges, in substance, that upon certain false and fraudulent representations

by the defendants the complainant was induced to make an advance to them of \$20,000, to be invested in the purchase of cotton for the benefit of all the parties. It is averred, also, that as an inducement for making said advance, and an indemnity therefor, the defendant Wright represented himself as the owner of valuable real estate in Cincinnati, which he promised to mortgage to the complainant to secure him against loss for said advance in money. The bill contains direct allegations of fraud on the part of defendants, prays for an account, and for a decree requiring the defendant Wright to execute a mortgage on the real estate in Cincinnati, according to his promise.

The defendant Wright has filed a plea to the bill, denying all the allegations of fraud, and averring, as to the averment of the bill that he promised to execute a mortgage of real estate, that if any such promise was made it was verbal, and therefore void under the statute of frauds.

The pending motion in the case is for an order to withdraw the plea from the files, and to require an answer to the merits. The only question intended to be presented on this motion is whether, under the allegations of the bill, the defendant Wright can rely on his averment that the promise to execute the mortgage was void under the statute of frauds, without an answer in response to the charges of fraud in obtaining the advances of money by the complainant.

The defendant has an undoubted right to set up that the agreement to mortgage was by parol, and therefore void. But the law seems now to be well settled, that where facts are asserted in a bill, the effect of which may be to take a verbal agreement out of the operation of the statute of frauds, it is incumbent on the respondent to respond by answer to such facts. This would seem to be the fair construction of the thirty-second rule of the rules of practice in chancery, adopted by the supreme court for the guidance of the courts of the United States. And such seems to be the law applicable to the question as laid down by Judge Story. Story's Eq. Plead., 591.

It is clear that a plea merely setting up the invalidity of an agreement under the statute of frauds, where other facts are averred in the bill in support of the complainant's equity, and which may be of a character to require a court to ignore the plea of the statute, the defendant should be required to file his answer to such facts. Such, it seems to the court, is in

accordance with the spirit and design of the thirty-second rule before referred to. And without deeming it necessary, in deciding the present motion, to refer to the frauds alleged in the bill, and without intimating any opinion upon the question whether, if the frauds charged were proved, the legal effect would be to supersede the plea of the statute of frauds, and present the entire transaction for inquiry on the broad principles of equity, an order will be entered requiring the defendants to file their answer to the bill. There can be no hardship in such an order. The defendants should gladly avail themselves of the opportunity of denying the frauds charged. I trust they will be able to acquit themselves of all imputations impugning their integrity in the transactions set out in the bill.

VAN REIMSDYK *v.* KANE.

(Circuit Court for Rhode Island : 1 Gallison, 371-386. 1812.)

STATEMENT OF FACTS.—Bill in equity, filed to charge the estate of a deceased partner with the payment of a partnership debt, contracted by the agent of the firm, who drew a bill of exchange at Batavia on a firm in Amsterdam for the account of the owners of the ship Patterson, who were Clarke, the deceased, and the firm of Monroe, Snow & Monroe, of which firm Benjamin Monroe, who was the drawer of the bill, was a member. The bill charged that the firm of Monroe, Snow & Monroe was insolvent and had been discharged under the insolvent laws of Rhode Island ; that Clarke was dead, leaving assets sufficient to pay the debt. The answer admitted that the proceeds of the bill passed to the use of the owners of the ship. It denied the agency of the drawer of the bill, and insisted that Monroe, Snow & Monroe were liable for the debt notwithstanding the discharge, and were now able to pay it. The deposition of the drawer of the bill, Benjamin Monroe, was ruled out as incompetent, and objection was taken to the bill for the want of proper parties.

Opinion by STORY, J.

The first question seems to be, whether the discharge of the firm of Monroe, Snow & Monroe under the insolvent act of Rhode Island is a complete discharge of them from this debt. The language of the insolvent act itself (1756) is, that a discharge under it shall be a perfect discharge "of and from all

debts, duties, contracts and demands of every nature and kind whatsoever that shall be at that time outstanding against the *debtor*, debts due to the crown itself only excepted." And section 6 provides that every creditor who shall not prove his debt before the commissioners within the time limited by the act shall not be entitled to have any action or suit therefor "at any court within this colony," "and that this act being pleaded in bar, shall be sufficient to bar the same." By an act of the legislature of Rhode Island, the full benefit of this act was allowed to the firm of Monroe, Snow & Monroe, and the only exception was of debts due to the state. It is admitted on all sides that Monroe, Snow & Monroe have been duly discharged under the act from all debts upon which it can operate as a bar.

But admitting the right to exist and to be exercised in the fullest extent, it will deserve further consideration whether the courts of the United States are bound to enforce against foreigners or citizens of other states, rightfully suing therein, the full effect of a bar of this nature.

It is true that the judiciary act of 24th September, 1789, ch. 20, sec. 34, has provided that, except where the constitution, treaties or statutes of the United States shall otherwise provide, the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. But the laws of the states are to be *regarded only as rules of decision*, and not as exclusive or peremptory injunctions. If a state were to declare that no action should lie upon a contract entered into by a citizen thereof with a foreigner or a citizen of another state, under any circumstances whatsoever; or if a state were to declare that interest reserved upon such a contract, if good according to the law of the place of that contract, should be void, it would, I think, be difficult to admit that such laws would be of paramount authority in the courts of the United States. A more striking case would be a policy of insurance, on which the right of recovery should be perfect by the law of the state where it was made, upon the merits, and yet which, by the law of the state where the suit was brought, would be void, or receive a different construction from local ordinances. There must then be some limitation to the operation of this clause, and I apprehend such a limitation must arise whenever the subject-matter of the suit is extra-territorial. In controversies

between citizens of a state, as to rights derived under that state, and in controversies respecting territorial interests, in which, by the law of nations, the *lex rei sita* governs, there can be little doubt that the regulations of the statute must apply. But in controversies affecting citizens of other states, and in no degree arising from local regulations, as for instance foreign contracts of a commercial nature, I think that it can hardly be maintained that the laws of a state to which they have no reference, however narrow, injudicious and inconvenient they may be, are to be the exclusive guides for judicial decision. Such a construction would defeat nearly all the objects for which the constitution has provided a national court.

But it is contended that whether the discharge of Monroe, Snow & Monroe be or be not a complete bar, they and their assignees ought to have been made parties to the present suit. Let us consider this point. It is a general rule, that every person interested in the subject-matter should be made a party to the bill. Miff. Pl. Ch., 145; Coop. Pl. Ch., 33. Therefore, where there is a joint, or joint and several contract, it is laid down that the plaintiff must bring each of the debtors before the court. The reasons assigned for the rule are, that the debtors are entitled to the assistance of each other in taking the account, and to mutual contribution upon excess of payment beyond their respective shares. But where the reasons cease, the rule ceases also, and therefore, if the demand be admitted, and there can be no effectual contribution from the other parties, it is not allowed to prevail (*Madox v. Jackson*, 3 Atk., 406); and in cases of joint and several contracts, the rule itself has not stood without contradiction. *Collins v. Griffith*, 2 P. Will., 313; S. C., 2 Eq. Abr., 188, pl. 2. The rule has been relaxed where the parties before the court were the only solvent persons, and admitted the debt (3 Atk., 406; 2 Dick., 738); where the absent party was beyond the process of the court (Pre. Ch., 83; *Darwent v. Walton*, 2 Atk., 510); and where he stood in the situation of a mere surety (3 Atk., 406); though it might be otherwise, if he were a co-surety. *Angerstein v. Clark*, 2 Dickens, 738.

It is also a general rule, operating by way of exception on the former, that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree. Therefore, on a bill by creditors or purchasers against the assignees of a bankrupt, it seems now settled that the bank-

rupt himself need not be made a party, though it was formerly otherwise. 2 Vern., 32; 3 P. Will., 311, note I; Collet v. Wollaston, 3 Bro. Rep., 228.

Let us now apply these rules to the present case. The bill is brought to charge the executors of a deceased partner, having assets, with a joint debt, which at law survived against the firm of Monroe, Snow & Monroe. The ground of equitable interference is, that the surviving partners are certificated insolvents; and whatever may have been the doubts as to this branch of chancery jurisdiction in former times, it has been gradually settled, and is now placed beyond all controversy. Lane v. Williams, 2 Vern., 242; Heath v. Perceval, 1 P. W., 682; Simpson v. Vaughan, 2 Atk., 31; Bishop v. Church, 2 Ves., 101, 371; Daniel v. Cross, 3 Ves. Jr., 277; Thomas v. Frazer, 3 Ves. Jr., 399; Burn v. Burn, 3 Ves. Jr., 573; Stephenson v. Chiswell, 3 Ves. Jr., 566.

In cases where a suit is brought against executors *on other grounds*, it seems clear that the rule that all surviving co-obligors should be parties in general prevails. 2 Vent., 348; 3 Atk., 406. Shall it be permitted to prevail, where no relief can be given against the co-obligors? Shall a certificated bankrupt, who is a surviving partner, be joined with the executors, although no remedy can be effectually had in the suit against him? No authority has been adduced exactly in point. The case of Ashurst v. Eyre, in 2 Atk., 51, was supposed at first to support the affirmative; but it is very clear, upon a further examination of that case, as corrected in 3 Atk., 341, that no such question could have occurred, as the parties appear all to have been solvent. There is obviously a mistake in what is imputed to Lord Hardwicke in speaking of this case in 3 Atk., 406.

In no case where relief has been sought against the representatives of a deceased partner, on the ground of bankruptcy of the surviving partner, have I been able to discover that the bankrupt himself or his assignees have been made parties. On the contrary, if the reports can be relied on as evidence, the bill has been uniformly against the representatives alone. This very silence, in cases so strenuously and ably argued, affords a strong presumption of the practice and the law of the court. There seems, indeed, good reason why they should not be made parties, because the bankrupt may plead his certificate in bar without further answer, and the assignees are

bound to apply the property in their hands, according to the course of distribution prescribed by the law and the court, among the creditors who prove their debts under the commission. They have, therefore, no interest in the case stated in the bill, and do not fall within the principle of the rule as to parties. If, indeed, it appeared that there was a surplus in the hands of the assignees beyond the sum necessary for payment of all other debts, perhaps equity would interpose, and in some shape require an application to that fund in aid of the executors. As to the objection that the executors in this way would be deprived of all assistance in taking the account, and of contribution, it may be answered that they may file a cross-bill, and avail themselves of all legal evidence in their defense, and the right of contribution does not concern the plaintiff. It is *res inter alios acta*. I am therefore well satisfied, upon the reason of the thing and the practice, that if the certificate of Monroe, Snow & Monroe had been a valid discharge, neither they nor their assignees need have been made parties.

But it is not necessary absolutely to decide this point, because there is another view of the subject which is fatal to the bill in its present shape. In order to maintain the jurisdiction of this court, it is necessary that the bill should charge an absolute discharge or insolvency of Monroe, Snow & Monroe. I am of opinion that no such discharge is shown; and in the bill, there is no allegation that they were at the filing of the bill actually insolvent. Nothing can be more clear than that if they were liable at law, and able to pay, the present bill could not be sustained. It is perfectly well settled that equity will not lend its aid to reach assets in the hands of executors, when a complete, adequate and effectual remedy exists at law against surviving solvent partners. *Hoare v. Contencin*, 1 Bro. Rep., 27. The bill therefore does not contain an allegation which is now material, and the answer denies the present insolvency.

Whether, if the bill did charge such insolvency, and it were admitted or proved, it would become necessary and proper to make the insolvents or their assignees parties to the suit, I give no opinion. If the parties raise the question, it will deserve and receive the deliberate consideration of the court.

[NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

CHAPTER VII.

FURTHER PROCEEDINGS ON PART OF COMPLAINANT.

Rule 27.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent : nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.

Rule 33.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

Rule 45.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

Rule 61.

After an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

Rule 65.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

Rule 62.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

Rule 35.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

Rule 34.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to

that period, unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

Rule 38.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for that purpose.

Rule 63.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court, and shall enter, as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

Rule 66.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

Rule 47.

In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

Rule 64.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the excep-

tions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

BROOKS *v.* BYAM.

(Circuit Court for Massachusetts: 1 Story, 296-307. 1840.)

STATEMENT OF FACTS.—Bill in equity for an injunction against the further prosecution of a suit at law brought by present defendants against present plaintiff. Plaintiff excepts to the answer of one of the defendants.

Opinion by STORY, J.

The question arising in this case is upon the exception taken by the plaintiff in equity to the answer of Prentiss Whitney, one of the defendants, "because, in stating in his answer what he has been informed of by Byam (another defendant), he does not say whether he actually believes the same to be true." Certainly this exception is taken in a form and manner entirely too general to be upheld by the court. The exception should have stated the charges in the bill, and the interrogatory applicable thereto to which the answer is addressed, and then have stated the terms of the answer *verbatim*, so that the court without searching the bill and answer throughout, might at once have perceived the ground of the exception and ascertained its sufficiency. It is very properly observed by the vice-chancellor, Sir John Leach, in *Hodgson v. Butterfield*, 2 Sim. & Stu., 236, that, "if the plaintiff complains that a particular interrogatory of the bill is not answered, he must state the interrogatory in the very terms of it, and cannot impose upon the court the trouble of first determining whether the varied expressions of the interrogatory and the exception are to be reconciled." See, also, *Gressley on Evid.*, 21. To which it may be added, that the same rule applies in respect to the necessity of stating the charge or fact in the bill on which the interrogatory is founded; for, if the interrogatory be irrelevant to the matters charged in the bill, the defendant need not answer the interrogatory at all. *Mitford, Eq. Pl. by Jeremy*, 45; *Cooper, Eq. Pl.*, 12; *Gilb. For. Roman*, 91, 218; *Story on Equity Plead.*, § 36; *Gresley on Evid.*, 17 to 20, Am. edit., 1837; *Story on Equity Plead.*, §

853; Harrison, Ch. Pract. by Newland, ch. 31, p. 181. The court ought, therefore, without searching through the whole bill, from the form of the exception, to have the materials fully before it by which to ascertain at once its competency and propriety. In this respect the exception is in itself insufficient and exceptionable. The objection, however, has not been insisted upon at the bar.

Nothing is more clear in principle than the rule that, in the case of an interrogatory pertinent to a charge in the bill, requiring the defendant to answer it "as to his knowledge, remembrance, information and belief" (which is the usual formula), it is not sufficient for the defendant to answer as to his knowledge; but he must answer also as to his information and belief. The plain reason is that the admission may be of use to the plaintiff as proof if the defendant should answer as to his belief in the affirmative without qualification. Thus, although a defendant should state that he has no knowledge of the fact charged, if he should also state that he has been informed and believes it to be true, or simply that he believes it to be true, without adding any qualification thereto, such as that he does not know it of his own knowledge to be so, and therefore he does not admit the same, it would be taken by the court as a fact admitted or proved; for the rule in equity generally (although not universally) is that what the defendant believes the court will believe. 2 Daniell, Chan. Prac., 257; id., 402; Gresley on Evid., 19, 20; Potter v. Potter, 1 Ves., 274; Carth v. Jackson, 6 Ves., 37, 38; Story on Eq. Plead., § 854. The rule might, perhaps, be more exactly stated as to its real foundation by saying that whatever allegation of fact the defendant does not choose directly to deny, but states his belief thereof, amounts to an admission on his part of its truth, or that he does not mean to put it in issue as a matter of controversy in the cause. But a mere statement by the defendant, in his answer, that he has no knowledge that the fact is as stated, without any answer as to his belief concerning it, will not be such an admission as can be received as evidence of the fact. 2 Daniell, Ch. Pr. 257; id., 402; Coop. Eq. Pl., 314; Harris, Ch. Pract. by Newl., ch. 31, p. 181. Such an answer is insufficient; and, therefore, the defect properly constitutes a matter of exception thereto, since it deprives the plaintiff of the benefit of an admission to which he is justly entitled. *Ibid.* However, courts of equity do not, in this respect, act

with rigid and technical exactness as to the manner in which the defendant states his belief or disbelief; if it can be fairly gathered from the whole of that part of the answer what is, according to the intention of the defendant, the fair result of its allegations. 2 Daniell, Ch. Pr., 257; *Amhurst v. King*, 2 Sim. & Stu., 183.

It is obvious that, in answers as to the information and belief of the defendant, there may be, and, indeed, ordinarily will be, partial admissions and partial denials of every shade and character, some of which may be delivered in terms of great ambiguity and uncertainty, and some mixed up with various qualifications and attendant circumstances. *Gresley on Evid.*, 2d edit., 1837. No general rule, therefore, can be laid down which will govern all the different classes of cases which may thus arise as to the sufficiency or insufficiency of an answer in this respect. A man may have an undoubting belief of a fact, or he may disbelieve its existence, or he may believe it highly probable, or merely probable, or the contrary, or he may have no belief whatsoever as to it. In each of these cases he is bound to answer conscientiously as to the state of his mind in the matter of his belief; and if he does, that is all which a court of equity will require of him. If a man truly states that he cannot form any belief at all respecting the truth of the fact or information, that is sufficient, and it puts the plaintiff upon proof of it. If, on the other hand, the defendant should state (as in the present case the defendant does in effect state) that he "has no knowledge, information or belief that the fact or information inquired about is not true," or if he states (as in the present case) that he has been informed by a party and verily believes, that such party did not possess any knowledge, information or belief of the fact which the interrogatory points out,—in each of these cases it seems to me that the answer, if expressive of the true state of mind of the defendant, might, at least for some purposes, be held sufficient. But then, if such language were unaccompanied by any other qualifications or explanations, I should understand that the defendant did mean to assert his belief of the truth of the information or statement of fact, because, if he had no knowledge, information or belief that it is not true, he must be presumed to give credit to it; and if he did not intend so to be understood, it would be his duty to say in express terms that he had no belief about the matter; and

he ought not to be allowed to shelter himself behind equivocal or evasive or doubtful terms, and thereby to mislead the plaintiff to his injury.

And this leads me to remark, and it is the real and only point of difficulty which I have felt upon the exception, whether, although the plaintiff may agree to take and accept such an admission, interpreting it as affirmative of the defendant's belief, if in that sense it would be beneficial to himself, he is positively bound to receive it, when it is clearly susceptible of a different, or even of an opposite, interpretation, which may affect the nature and extent of his proofs at the hearing of the cause. Upon full reflection, I think that he is not positively bound to receive it, although certainly I should interpret it as an affirmative, if it would be favorable for the plaintiff; but he has a right to require that the defendant should state in direct terms, or, at least, in unequivocal terms, either that he does believe, or that he does not believe, the matter inquired of, or that he cannot form any belief, or has not any belief concerning the matter; and according as the answer shall be the one way or the other, that he calls upon the plaintiff for proof thereof, or he admits it, or he waives any controversy about it.

Upon this ground my opinion is that the exception is well founded, at least, as to some of the allegations in the answer. It may, perhaps, be sufficient for the court merely in this general manner to intimate its present opinion upon the case; and it will be easy for the counsel to make its application to the various parts of the answer complained of. But to make myself more clearly understood, I wish to give an illustration of the principle, drawn from the present bill and answer, especially as the nature of the objection may thereby be seen in a more strong and exact light.

The object of the bill is to obtain, among other things, a perpetual injunction to a suit now pending on the law side of this court, brought by the defendants in the bill (Byam and others) against the plaintiff (Brooks), for a violation of a patent, which they claim title to as assignees of the patentee; and, among other charges, the bill for this purpose alleges that the original patentee (Alonzo D. Phillips) had before his assignment to these parties assigned a limited right therein to one John Brown, under whom the defendant claims a still more limited title, as a sub-purchaser, *pro tanto*, and insisted

that his acts done in supposed violation of the patent are rightfully done under this sub-title; The patent is alleged to bear date on the 24th of October, 1837; the assignment to Brown on the 2d of January, 1837; the assignment to Brooks on the 18th of September, 1837; but it was not recorded until the 15th of July, 1839; and the assignment to Byam on the 28th day of July, 1838, under whom the other defendants (Whitney and others) derive title, which only was recorded within the time prescribed by law, whereas the assignment to Brown was not. Under these circumstances the bill charges that Byam, at the time of the assignment to him, and the other defendants (and among them Whitney), at the time of the assignment to them by Byam, had knowledge and information and good cause of belief of the prior assignment to Brown. And in the interrogatory part of the bill the defendants are required "full, true, direct, particular and perfect answer and discovery to make, and that not only according to the best of their knowledge, but to the best of their respective information, hearsay and belief, to all and singular the matters and allegations and charges aforesaid."

Now, the answer of the defendant Whitney (which is excepted to) states that he (the defendant) does not of his own knowledge know whether, at the time of the assignment to Byam, he (Byam) had any information or knowledge, or had any cause to believe, that Phillips had previously made any conveyance to Brown, or Brown to the plaintiff (Brooks), as alleged in the bill; but this defendant has been informed by said Byam that, at the time when the said Phillips conveyed and assigned to him all his right and interest in and to the patent-right, the said Byam had no knowledge, information or cause to believe that the said Phillips had made any conveyance to the said Brown, or that the said Brown had made any conveyance to the complainant; *and this defendant has no knowledge, information or belief that the information so derived from the said Byam is not true.*" Now, it is to the matter and form of this last clause (and a like allegation is to be found in other parts of the answer) that the objection is taken by the exception. The argument is that the clause is ambiguous; that it does not assert, in direct terms, that the defendant believed or disbelieved the statement of Byam; or that the defendant had no belief, or was unable to form any belief, about the matter, and, therefore, required the plaintiff to prove the

knowledge, information or belief of Byam at the time of the assignment to him. So that, in fact, the defendant, by the form of his allegation, does not positively put the asserted fact in controversy, as to the knowledge, information or belief of Byam, by affirming his own belief of Byam's statement; neither does he dispense with the proof thereof by denying his own belief thereof; neither does he assert that he is unable to form any belief upon the subject, and therefore calls for proof of the allegation of the bill on this point; but he leaves the matter in a state of ambiguity and open to different interpretations as to the true intent and meaning of the answer.

It appears to me that in this view the exception is well founded. When the defendant says that he "has no knowledge, information or belief that the information so derived from the said Byam is not true," he merely pronounces a negative, which may, indeed, in some sort, amount to a negative pregnant, *arguendo*, that, as he has no information or belief that it is not true, therefore he believes it to be true, which would certainly be a natural, although not an irresistible, presumption. But it seems to me that the plaintiff has a right to more than this; to know whether the defendant himself has placed confidence in the statement or not, or whether his mind hangs *in dubio*, and he is unable to form any belief either way. In the latter case, certainly, less evidence would be necessary to infer presumptively the knowledge, information or belief of Byam himself than if the defendant himself believed Byam's statement and acted upon that belief; for a court is not bound, in favor of a defendant, to have a more confident belief in a party than the defendant himself professes to have. But what I rely on is that the defendant, by such a form of answer, leaves it entirely equivocal whether he believes or is unable to form any belief; and the plaintiff has a right to know positively which of the two is his real predicament.

The exception, therefore, on this point, ought to be allowed.

MYERS v. DORR.

(Circuit Court for Vermont: 13 Blatchford, 22-31. 1870.)

STATEMENT OF FACTS.—Myers filed a bill against Dorr for a dissolution of a partnership and for an account. He was a citizen of Ohio and the defendant resided in Vermont. He

afterwards filed an amended and supplemental bill, seeking to make the Sutherland Falls Marble Company a defendant, and requiring that company to fulfill a contract it had made to furnish marble to the firm, and charging that, colluding with Dorr, it had refused to do so since the appointment of a receiver in the case. The marble company appeared specially and pleaded to the jurisdiction that it was a Massachusetts corporation, and was not chartered by nor found in Vermont. There was a replication to this plea. The cause was heard as to the marble company.

Opinion by WOODRUFF, J.

The single question presented by the pleadings in this suit as now brought before us, is whether the facts alleged by the Sutherland Falls Marble Company in their plea are proved. The complainant has thought proper, by replying to the plea, to put its averments in issue.

The rule is elementary and is well settled, that, when a complainant in equity, instead of setting down the defendant's plea for argument to test its sufficiency, elects to reply thereto, denying the facts alleged, he admits its sufficiency both in form and substance as a defense to all the matter of the bill to which it is pleaded, and that if the facts shall, upon the proofs taken, be found established, the bill must be dismissed (Story's Eq. Pl., § 697; *Gallagher v. Roberts*, 1 Wash., 320; *Hughes v. Blake*, 6 Wheat., 453; *Rhode Island v. Massachusetts*, 14 Pet., 210, 257); and this must be done without reference to any equity arising from other facts stated in the bill. There is no occasion to discuss the evidence. The proofs taken to sustain the allegations of the plea are uncontradicted by any evidence produced on the part of the complainant. Indeed, we do not understand the counsel for the complainant to claim that those facts are not established. The plea is to the jurisdiction of the court over the defendant corporation. By replying, the complainant admits the sufficiency of the facts alleged to support the plea. The allegations of the plea are proved, that is to say, it is proved that the corporation was not organized for the sole purpose of quarrying marble in Vermont, and has property without that state; and that it has never had or adopted, or acted under, any charter granted by the legislature of that state, and is not a citizen of that state, but, on the contrary, is a corporation organized and established within and by the laws of the state of Massachusetts only.

It is quite too late to insist that the residence or citizenship of a director or stockholder of a corporation in another state than that by which it was created changes or affects its citizenship. Whatever was formerly held on that subject to the contrary, it is now well settled that a corporation can have no citizenship or inhabitancy out of the state wherein it was created; and this has become too familiar to require that we should refer to the numerous modern cases to that effect. We might, therefore, with great propriety, stop here, and say the defendant has established the plea, and is, therefore, entitled to a decree dismissing the bill. The discussion, upon the hearing, had a much broader range. The counsel for the complainant treated the hearing as if it were upon a demurrer to the plea, insisting that the facts alleged therein and proved did not show a want of jurisdiction, and that, in considering that question, the court should regard every fact alleged in the bill, which the plea does not deny, as true. What we have above said is in direct denial that the complainant is at liberty to raise any question touching the sufficiency of the plea. But if we should pursue the subject, and consider the views urged upon us, the result to the complainant must be the same.

The defendant is a corporation created by or under the laws of the state of Massachusetts, and has no other residence or inhabitancy. The judiciary act of 1789, § 11 (1 U. S. Stat. at Large, 78), is express, that no civil suit shall be brought before a circuit or district court, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. In respect to the question of jurisdiction, a corporation is to be treated *pro hac vice* as a natural person. *Clarke v. N. J. Steam Nav. Co.*, 1 Story, 531; *Day v. Newark Ind. R. Co.*, 1 Blatch., 628. Such corporation cannot be found out of the state wherein it is created, within the meaning of the statute, and be served by or through its officers. *Pomeroy v. The N. Y. & N. H. R. Co.*, 4 Blatch., 120. To the general rule declared by the statute, see *Toland v. Sprague*, 12 Pet., 300; *Piequet v. Swan*, 5 Mason, 35; *Richmond v. Dreyfous*, 1 Sumn., 131, and the other cases cited above; and the case of *Minnesota Co. v. St. Paul Co.*, 2 Wall., 609, relied upon by the complainant as creating an exception, affirms the general rule. And yet here

the Sutherland Falls Marble Company is sued and required to answer in the district of Vermont. The circuit court of that district has no jurisdiction to compel that corporation to appear and answer, and the repeated decisions of the supreme court, that no decree can be pronounced which shall affect the rights of a party who is out of the jurisdiction, show that no decree can be pronounced against this defendant. *Story v. Livingston*, 13 Pet., 359; *Coiron v. Millaudon*, 19 How., 113; *Shields v. Barrow*, 17 How., 130; *Northern Ind. R. Co. v. Mich. Cent. R. Co.*, 15 id., 233; *Barney v. Baltimore City*, 6 Wall., 280.

In order to sustain the jurisdiction, the counsel for the complainant insists that the Sutherland Falls Marble Company have, since this suit commenced, purchased the interest of the defendant Dorr in the contract with them; and this is claimed to be a submission to the jurisdiction, and to make them substantially parties to the suit. In the first place, the fact alleged is not proved, and we are constrained so to find, upon the evidence. In the next place, if proved, it could not affect the question. A purchaser *pendente lite* may be said to submit to the jurisdiction, but in this sense only—he purchases subject to the litigation; but the litigation may proceed without noticing his purchase, and he does not, by such purchase, become a necessary party. If the court have not jurisdiction of him, he cannot be compelled to come in as a party. And, once more, it is claimed to be essential to the rights of the complainant, and to the protection of the business now in the hands of the receiver, and its successful prosecution, that the complainant should have the relief against the Marble Company sought by the supplemental bill. A short answer might be given to this. The complainant or the receiver must seek that relief in a court having jurisdiction of the party against whom it is sought. The circumstance that such relief would be beneficial to the parties, and prevent incidental loss to them, pending the prosecution of the original bill, will not warrant or create any extension of the power of the court.

We forbear to remark upon the extraordinary character of the whole case now before us, in which a complainant who has commenced a suit to dissolve a copartnership and adjust its affairs with his partner, seeks, by what he calls a supplemental bill, to compel a third party, who has no interest in the copartnership, specifically to perform an agreement made

with the firm ; and that is just what is sought against this defendant. As to him the bill is, in every just sense, an original bill. If the complainant can maintain such a suit upon the contract in question, he must prosecute it where the court has jurisdiction, and the attempt to unite it with a controversy with his partner touching their copartnership affairs cannot avail anything. And so, also, the receiver of the copartnership property, if, in virtue of his receivership, he can sue on the contract, or if he can maintain a suit for its specific performance, must prosecute it elsewhere. Arguing that it is important that this court should have jurisdiction of this defendant, in order to do full justice and protect all parties, will not avail to confer jurisdiction where the limitation imposed by statute and settled by adjudication forbids its exercise.

We have referred to the nature of the suit for the purpose of adding that the case of *Minnesota Co. v. St. Paul Co.*, 2 Wallace, 609, touches no question here discussed. There a suit was rightly brought and was decided, the court having jurisdiction of the parties, a decree was made, it was found that certain orders made in execution of the decree were invalid by reason of a change in the jurisdiction of the court, and that further adjudication was necessary in order to the execution of the decree and the disposal of the property in the hands of the receiver, and it was held that a bill supplemental in its nature, filed in order to carry the prior decree into execution and administer the property, was to be regarded, not as an original suit, but as a continuation of the former suit, and that, as no other court could execute that decree and make due administration of the property, the power of the court to act was not impaired by the fact that persons who had acquired interests in the property or questions were citizens of the same state as complainant in such last-named bill ; and the court refer to cases in which a person acquiring rights as purchaser under a decree is regarded as a party having a right to proceed in continuation of the suit, so far as to protect his rights, irrespective of any question touching his citizenship. In a recent case (*Jones v. Andrews*, 10 Wallace, 327), the supreme court have gone so far as to hold, that, where a judgment has been recovered in a suit in the circuit court, and the judgment creditor is proceeding in that court, by the process of garnishment, against an alleged debtor of the defendant in the judgment, such debtor may file a bill supplemental or an-

ancillary to his defense, to protect himself against a compulsory proceeding duly instituted to compel him to pay, showing by such bill a just and equitable defense; and the necessity of making the creditor not residing in the district a party will not defeat such ancillary suit. And in *Freeman v. Howe*, 24 How., 450, where a suit had been duly commenced in the federal court by attachment of property, and while the same was in the possession of the marshal, it was taken from him by process of replevin issued by the state court at the suit of a third party, the court not only held that such interference with the custody of the marshal was illegal, but declared that a bill of equity might, in such case, be filed by the plaintiff in the federal court, against the plaintiff in the replevin suit, notwithstanding both were citizens of the same state. These cases proceed upon the ground, that, where the federal court is proceeding in the due exercise of its jurisdiction, it has power to regulate and control its own judgments, and carry them into execution, and power to maintain its own jurisdiction, and protect either plaintiff or defendant therein, in respect of the subject-matter thus lawfully within its jurisdiction, and, by an ancillary suit, to call in parties for those purposes, whether their citizenship would have authorized an original suit against them by the plaintiff in such ancillary proceeding or not. The present is no such case. Here the original suit was for the dissolution of a co-partnership, and the adjustment of the rights of the complainant and Dorr. In that the Marble Company had no interest, and they have done nothing to prevent that suit from proceeding to its termination according to its intent and purpose. The cause of action against the Marble Company is its refusal to perform a contract made with the firm, and the decree sought is the specific performance of that contract. To grant the relief might be useful to the parties to the original bill, but it has no legal connection with the cause of action therein, and is in no sense necessary to the full exercise of the jurisdiction of the court. It is not in any sense a continuation of the original suit, but an attempt to add a new cause of action against a new party.

This bill must be dismissed as to defendants, the Sutherland Falls Marble Company, with costs.

NATIONAL BANK *v.* INSURANCE COMPANY.

(14 Octo, 54-77. 1881.)

Appeal from U. S. Circuit Court, District of Maryland.

Opinion by MR. JUSTICE MATTHEWS.

It is also assigned for error that the appellee failed to set down for argument or traverse the pleas of the defendant, as required by the thirty-eighth equity rule; but the pleas in this case were irregularly filed and defective, under the thirty-first rule, for lack of the affidavit of the defendant that they were not interposed for delay, and of the certificate of counsel that they were, in his opinion, well founded in point of law, and may well have been disregarded on that account. Besides, the second and third pleas were such only in form, as they merely alleged matters of law and not of fact. "The office of a plea," said Lord Eldon, in *Rowe v. Teed*, 15 Ves. Jr., 372, "generally, is not to deny the equity, but to bring forward a fact which, if true, displaces it." The first plea is open to the same objection; for, although it appears to negative the averment of a matter of fact essential to the complainant's case,—that he was a creditor of the defendant,—yet really it merely denies the conclusion of law, to be drawn from the whole of the case as stated in the bill. Every matter, therefore, covered by the pleas was necessarily embraced in the hearing upon the bill, answer and proofs. There was no issue tendered on matter of fact that was left undecided, and no matter of law affecting the merits that was not adjudged.

It is also assigned for error that the complainant failed to file a replication to the answer. Leave to do so was granted by the court, on the complainant's motion; and although the transcript does not show that it was done, the parties went to the hearing as if it had been done, submitting the case upon the proofs which had been taken, as though a formal issue had been perfected. The same objection was made in the cases of *Clements v. Moore*, 6 Wall., 299, and *Laber v. Cooper*, 7 id., 565, under circumstances not distinguishable from the present, and for the reasons there stated it is overruled.

The absence of any answer by Dillon, and the want of an issue upon it, is also assigned for error. The transcript shows that an answer had been filed by Dillon, but had been lost or mislaid. This fact having been called to the attention of the

court below, before the hearing, the circuit judge announced that he would not proceed with the hearing without the answer, if the respondent's solicitor, then present, objected to the hearing for that reason. No objection was made, and the hearing properly proceeded. For aught that appears, Dillon's answer may have been a confession of the truth of the allegations of the bill. We find no error in the record.

Decree affirmed.

[NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

MELLUS *v.* THOMPSON.

(Circuit Court for Massachusetts: 1 Clifford, 125-135. 1858.)

STATEMENT OF FACTS.—Suit was brought against one Howard, a resident of California, who, after answering, died, and this bill of revivor was filed against his administrators. Service was made upon one of the administrators, who appeared and pleaded to the jurisdiction, alleging the residence of Howard in California, and that he, the administrator, had never been appointed administrator by any court of Massachusetts.

Opinion by CLIFFORD, J.

When a plea to a bill in equity is set down for hearing under the thirteenth additional rule, as in this case, without being replied to by the complainant, all the facts therein alleged which are well pleaded must be considered as admitted for the purpose of determining the question whether the plea constitutes a sufficient answer to the suit. Accordingly the complainant insists, notwithstanding the present respondent is not a citizen of or resident in this state, and was never appointed executor of the last will and testament of the decedent by the state courts of this district, that he is entitled to revive the suit against him by virtue of his appointment as such executor by the court of probate for the county of San Francisco in the state of California, where he was domiciliated at the time of his appointment. All of the transactions for which relief is sought took place in California, and all of the assets belonging to the estate of the decedent are in that jurisdiction.

Certain rules and principles respecting the rights and powers of executors and administrators appear to be so fully settled

that they ought not to be regarded as the proper subjects of dispute. One is, that an executor or administrator, deriving his authority solely from another state, is not liable to be sued in his official character in this state for assets lawfully received by him in the jurisdiction where he was appointed, under and in virtue of the original letters of administration. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and it is well settled that it does not extend to other political jurisdictions. As matter of right it cannot confer any authority to collect by suit the assets of the deceased in another state; and whatever operation is allowed beyond the jurisdiction of the state where it is granted is mere matter of comity, which every other state is at liberty to accord or withhold, according to the policy of its own laws and with reference to the interests of its own citizens. *Vaughan v. Northup*, 15 Pet., 1 *Bond v. Graham*, 1 Hare, Ch., 482; *Spratt v. Harris*, 4 Hagg. Ecc., 405; *Price v. Dewhurst*, 4 My. & Cr., 76; *Whyte v. Rose*, 3 Ad. & E., 507, 43 Eng. C. L., 842. Executors and administrators are bound in general to account exclusively for all the assets they receive, under and in virtue of their administration, to the proper tribunals of the government from which they derive their authority; and it was expressly determined by the supreme court in the case of *Vaughan v. Northup*, that the tribunals of other states have no right to interfere with the assets which come to their possession in the jurisdiction where they are appointed, or to control their application. Repeated decisions have affirmed the principle that no suit can be maintained by or against an executor or administrator, in his official capacity, in the courts of any other state except that from which he derived his authority, in virtue of the probate and letters testamentary or the letters of administration there granted to him. *Fenwick v. Sears*, 1 Cranch, 259; *Dixon v. Ramsay*, 3 Cranch, 319; *Kerr v. Moon*, 9 Wheat., 565 *Armstrong v. Lear*, 12 Wheat., 169. Some attempts have been made by courts of justice in one or two jurisdictions to limit and qualify the general rule laid down in the earlier cases, but without success, as appears from numerous decisions both in this country and in England; and it may now be regarded as the established doctrine, that an executor or administrator appointed in one state cannot sue or be sued in his official character for any debts.

due to or from the estate under his administration in any other state, unless he is first appointed as such administrator or executor in the state where the suit is brought.

These principles, so far as respects the maintaining of an original suit, are not controverted by the counsel for the complainant, and they have been so repeatedly affirmed by courts of the highest respectability, that it seems unnecessary to multiply authorities upon the subject. That letters testamentary or of administration granted abroad, without new probate authority, give no right to sue or be sued, is a principle almost universally acknowledged by courts of justice. It was so held in *Carter v. Crosts, Godb.*, 33, decided in 1585, and since that period has been the received doctrine in most jurisdictions to the present time. *Tourton v. Flower*, 3 P. W., 366; 2 Kent's Com. (9th ed.), 563 and note c; *Hutchins v. State Bank*, 13 Met., 421; *Story, Conf. L.*, § 513; *Tyler v. Bell*, 2 My. & Cr., 110; *Whyte v. Rose*, 3 Ad. & E. (N. S.), 507, 43 Eng. C. L., 482.

But attention is drawn to the thirty-first section of the act of congress of the 24th of September, 1789, and it is insisted that the original suit in this case may be revived against the present respondent within the principles of that provision. It provides that where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment; and the defendant or defendants are hereby obliged to answer thereto accordingly; and the court before whom such cause may be depending is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. Further provision is also made, in case such executor or administrator shall refuse to become a party to the suit, that the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party to the suit.

At common law, the death of either party before judgment in real and personal actions abated the writ; and it was held by the supreme court, in *Green v. Watkins*, 6 Wheat., 260, that the provision contained in that section was necessary

to enable the action to be prosecuted against the representatives of the deceased party in cases where the cause of action survived. In the case of *Macker v. Thomas*, 7 Wheat., 530, the same court held that this provision was clearly confined to personal actions, assigning as the reason for the conclusion that the power to prosecute or defend is given to the executor or administrator of the deceased party, and not to the heir or devisee. Neither of those cases precisely touches the question under consideration, for the reason that the abatement of a suit in equity by the death of a party, in cases where the cause of action survives, does not amount to an unconditional determination of the suit. Unlike the abatement of a suit at common law, the death of one of the parties to a bill in equity, before a final decree, only has the effect in general to suspend the proceeding in the suit, but does not operate to extinguish the right of further prosecution, provided the proper representatives of the deceased party seasonably appear and prosecute the same by bill of revivor. Bills of revivor, strictly so called, lie only against the persons who are the proper representatives of the deceased party. If the suit has respect to the personal assets only of the deceased party, his executor or administrator is the proper person by or against whom the bill of revivor should be brought; but if the suit has respect to the real estate of the deceased, and the cause of action survives, then the heirs of the deceased party are the proper persons to institute and prosecute the bill of revivor. Story, Eq. Plead. (6th ed.), § 54.

Applying these principles to the present case, there would be no difficulty in sustaining the views of the complainant but for the fact that the respondent in the bill of revivor has never been appointed an executor of the last will and testament of the decedent by the tribunals of Massachusetts. His appointment, as the plea shows, emanated from the court of probate for the county of San Francisco, in the state of California; and if it be true, as was expressly held by the supreme court in *Vaughan v. Northup*, 15 Pet., 5, that the grant of administration upon the estate of a deceased person is strictly confined in its authority and operations to the limits of the territory of the government which grants it, then it follows, as it would seem, that the appointment of the respondent as executor by the tribunals of the state of California cannot have the effect to confer upon him that character in the courts

of another state. Federal laws do not make provision for the appointment of executors or administrators. They only recognize the existence of such appointments under the local law. Executors and administrators are recognized in the thirty-first section of the judiciary act now under consideration, but they are such as have received their appointments, not from federal authority, but from the tribunals of the state where the suit was pending at the time the abatement took place. Accordingly it was held by the supreme court, in *Aspden v. Nixon*, 4 How., 497, that executors and administrators appointed in one state cannot be known in another state as the representatives of the estate of a deceased person, for the purpose of prosecuting or defending a pending suit. This principle was subsequently affirmed by the same court in the case of *Stacy v. Thrasher*, 6 How., 58, in still more decisive language. Mr. Justice Grier said, in the case last named, that an administrator receives his authority from the ordinary or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and incumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction. He therefore cannot do any act to affect assets in another jurisdiction, as his authority cannot be more extensive than that of the government from whom he received it, and the courts of another state will not acknowledge him as a representative of the deceased or notice his letters of administration. *Borden v. Borden*, 5 Mass., 67; *Pond v. Makepeace*, 2 Met., 114; *Chapman v. Fish*, 6 Hill, 554.

Similar views were also held by the same court in *Hill v. Tucker*, 13 How., 467, in which the preceding cases were cited and approved. Nevertheless, circuit courts have jurisdiction of suits by or against executors or administrators, if they are citizens of different states, in certain cases where they are the real parties in interest before the court, and have succeeded, by virtue of their appointment, to all the rights and interests of their testators or intestates, as in suits upon promissory notes given by the deceased in certain special cases, or in bills of equity for an account. *Chappedelaine v. Dechenaux*, 4 Cranch., 306; *Childres v. Emory*, 8 Wheat., 669. Both of

those suits, however, were commenced in the district constituted within the limits of the political jurisdiction or state from which the defendants derived their authority. Civil suits may be brought against persons in their individual capacity, either in the district whereof they are inhabitants or in which they shall be found at the time of serving the writ. 1 Stat. at Large, p. 79. That provision, so far as the latter clause of it is concerned, does not apply to executors and administrators, for the reason that their authority is limited by the territory of the state from which it is derived; and it has been expressly held by the supreme court, in repeated instances, that they cannot be sued in any district out of the state from which their authority proceeds.

It was so distinctly held in *Vaughan v. Northup*, 15 Pet., 1, and such, as before remarked, is the settled law, both in this country and in England. *Fenwick v. Sears*, 1 Cranch., 259; *Dixon v. Ramsay*, 3 Cranch., 319; *Kerr v. Moon*, 9 Wheat., 565; *Aspden v. Nixon*, 4 How., 497; *Stacy v. Thrasher*, 6 How., 58; *Hill v. Tucker*, 13 How., 167. But reliance is placed upon the case of *Clark v. Mathewson*, 12 Pet., 170, as asserting a different doctrine. On a careful examination of the facts of that case, it does not appear to warrant any such conclusion. It was a bill in equity, brought by a citizen of the state of Connecticut against a citizen of the state of Rhode Island, for an account of certain transactions set forth in the bill, with a prayer for general relief. After the cause was at issue, it was by the agreement of the parties ordered by the court to be referred to a master to take an account, and pending the proceedings before the master the complainant died. Administration upon his estate was taken out by one John H. Clark, in the state of Rhode Island.

By the laws of the state, no person not a resident thereof can take out letters of administration; and such administration is indispensable to the prosecution or defense of any suit in the state, in right of the estate of the intestate. Clark filed a bill of revivor in the circuit court of Rhode Island against the defendants in the original suit, in which he alleged that they were citizens of that state; and he also alleged himself to be a citizen of the same state, and administrator of the intestate. Judge Story dismissed the bill of revivor, on the ground that it was a suit between citizens of the same state. Whereupon the complainant appealed to the supreme court,

where the decree of the circuit court was reversed, with the concurrence of the circuit judge; and it was held that the bill of revivor was a mere continuance of the original suit, and that, inasmuch as the parties to the original bill were citizens of different states, the jurisdiction of the court completely attached to the controversy, and could not be divested by the fact that the administrator of the complainant subsequently appointed was a citizen of the same state with the respondents. That principle is entirely consistent with the determination previously made, that the removal of the original plaintiff, after the commencement of the suit, into the same state with the respondent, does not divest the jurisdiction of the court, if they were citizens of different states at the time the suit was commenced. *Morgan v. Morgan*, 2 Wheat., 290; *Mollan v. Torrance*, 9 Wheat., 537; *Dunn v. Clarke*, 8 Pet., 1. Besides it will be perceived that the suit in that case was revived in a circuit court constituted and having jurisdiction in the state from which the administrator derived his authority; and consequently the decision of the court is perfectly consistent with all the previous and subsequent adjudications upon the subject.

It was objected in that case that the jurisdiction could not be sustained, because the complainant and respondent in the bill of revivor were citizens of the same state; but the supreme court held that congress, in the provision of the judiciary act under consideration, treated the revivor of the suit by or against the representatives of the deceased as a matter of right, and as a mere continuation of the original suit, without any distinction as to the citizenship of the representative, whether he belonged to the same state where the cause was depending, or to another state. This last remark was made by the court in answer to the objection that both parties in the bill of revivor belonged to the same state, and without any reference whatever to the question whether an executor or administrator appointed only by the probate court of another state could be made a party to such proceeding without a new appointment. For these reasons I am of the opinion that the case of *Clark v. Mathewson* does not touch the question under consideration. Such being the fact, the proceeding stands without any authority to support it, and must be determined upon general principles. All of the reasons assigned in the adjudged cases to show that an executor or administrator cannot be made an

original defendant, in a state other than the one from which he derives his authority, apply with equal force against making him a respondent to a suit in equity abated by the death of his testator or intestate. He has no official existence in such other state, and possesses no power there which he can exercise in his official character.

Decided cases have established the doctrine that the authority granted to him is strictly confined to the limits of the state from which it was derived; and if so, then it would seem to follow that any other person might be made a party defendant to the bill of revivor with equal propriety, and for the reason that, while here, in a jurisdiction where his authority is not acknowledged, he is not in any legal sense the representative of the estate of his testator. He cannot be liable *de bonis propriis* and as there are no assets in this jurisdiction there can be nothing on which a judgment would operate. Relief is prayed, not only for the payment of money, but that conveyances of real estate situated in California may be set aside, and that the same real estate may be conveyed to the complainant. Whether executors, as such, have authority, under the laws of California, to convey real estate does not appear, and is at least very doubtful. But if it were less so, it is difficult to see by what warrant this court can recognize the respondent as the executor of the last will and testament of the decedent, while it appears that he is not such by the local law of the district in which the suit is pending, and that there are no assets of the estate within this jurisdiction. Counsel would hardly contend that a bill of revivor could be maintained against an executor or administrator appointed in England, without new probate of the letters testamentary, or new letters of administration, in the state tribunals of the district where the original suit was brought.

Nothing is better settled than the rule that a person claiming under a will proved in one state cannot intermeddle with or sue for the effects of a testator in another state, unless the will be first proved in that other state, or unless he be permitted so to do by some law of that state authorizing such a proceeding. He cannot sue for the personal estate of the testator out of the jurisdiction of the power by which the letters of administration were granted, and upon the same principle and for the same reason he cannot be sued or compelled to defend a suit in any jurisdiction to which his authority as execu-

tor does not extend. *Doe v. McFarland*, 9 Cranch, 151 ; *Kerr v. Moon*, 9 Wheat., 571. Devisees or heirs would not be bound by the decree, if one were made, so far as the real estate is concerned, for the reason that they are not made parties to the bill of revivor, and have had no notice of the proceeding. It is obvious, therefore, if the court should render a decree that the complainant is entitled to the relief prayed for, the respondent in the bill of revivor would have no authority to comply with the order of the court, and the court would have no power to enforce its mandate. In view of all the circumstances disclosed in the case, I am of the opinion that the plea to the jurisdiction of the court is sufficient, and that the demurrer must be overruled.

CHAPTER VIII.

HEARING ON BILL AND ANSWER—TAKING TESTIMONY ON ISSUE JOINED—REFERENCE TO MASTER AND PROCEED- INGS THEREON—WITNESSES.

Rule 67.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time the commission may issue *ex parte*. In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings.

Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given ; provided, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing ; provided, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend ; provided, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit ; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions ; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in section 865 of the Revised Statutes.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing.

Rule 71.

The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your ex-

amination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

Rule 68.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the act of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or judge thereof shall, under all the circumstances, deem it reasonable.

Rule 69.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable, under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony.

Rule 70.

After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or com-

missioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

Rule 74.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

Rule 75.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

Rule 76.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or

recited. But such state of facts, charge, affidavit, deposition, examination or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.

Rule 77.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the act of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

Rule 78.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of court, which being certified to

the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

Rule 79.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

Rule 80.

All affidavits, depositions and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

Rule 81.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

Rule 82.

The circuit courts may appoint standing masters in chancery in their respective districts, (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring in the

appointment,) and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

Rule 83.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.

Rule 84.

And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs: the cost to be fixed in each case by the court, by a standing rule of the circuit court.

ALLIS v. STOWELL.

(Circuit Court for Wisconsin: 5 Federal Reporter, 203-206. 1880.)

Opinion by DYER, J.

STATEMENT OF FACTS.—This is a bill to restrain the infringement of two patents for saw-mill dogs, known as the Selden and Beckwith patents. On a previous hearing upon bill, answer and proofs, a decree was entered in favor of complainants, sustaining the validity of both patents. Subsequently the defendant moved that the cause be opened for a rehearing on the ground of newly-discovered evidence. The court granted a rehearing as to the Selden patent, but denied it as to the Beckwith patent, and it was ordered that the defendant have leave to amend his answer as prayed in said petition for a rehearing. By this order it was intended and understood that the controversy between the parties should be re-opened, but only to let in the newly-discovered matter, and to the extent only that the Selden patent might be thereby affected. The defendant filed an amended answer, which set up the new matter relied on to defeat the Selden patent, and also embraced all the original defenses to both patents. The complainant then filed a motion to strike the answer from the files for the reason that it was not limited in form and substance to the new matter, and therefore was not, as it is claimed, such an answer as the order for a rehearing authorized. The defendant then moved to dismiss the suit, under the sixty-sixth rule in equity, for the reason that no replication had been filed to the amended answer, and this is the motion now to be decided.

It is claimed by counsel for defendant that if the complainant desired to raise any question as to the regularity or sufficiency of the amended answer, he should have excepted to it; that a motion to strike from the files is irregular and cannot be entertained; and that as the answer was not excepted to, and a replication was not filed, he is entitled to have the suit dismissed, under the rule.

It is not intended now to pass upon the merits of the motion to strike the amended answer from the files. The only question to be presently determined is, Is the defendant entitled, in the face of that motion, to have the suit dismissed for want of a replication? In other words, is the complainant in such default as to entitle the defendant to such action by the court as he invokes?

It must be presumed that the motion to strike the amended answer from the files was made in good faith, and an inspection of the answer shows that it contains all the defenses which appeared in the original answer, in addition to those embraced in the new matter, on account of which a rehearing was granted. Whether this form of pleading, in the present attitude of the case, be regular or not, I do not, as before remarked, now decide. But it seems very clear that the court cannot treat the motion to strike the amended motion from the files as such an act of non-conformity to correct practice as leaves the complainant in default, and as entitles the defendant to a dismissal of the suit for want of a replication. Rule 66 provides that "*whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient*, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter. . . . If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course for a dismissal of the suit."

So it appears that if the answer shall be excepted to, or shall be adjudged or deemed insufficient, a replication is not to be filed. And I do not think that the only method that may be pursued to test the sufficiency or regularity of an answer is that of filing exceptions. Where a question is presented like that here involved, I am of the opinion that it may be raised by motion to strike the answer from the files, and the rule does not necessarily exclude such a course of procedure.

Whether or not in a given case exceptions should be filed, or a motion should be made to strike the pleading from the files, may depend upon the character of the objections which are made to the pleading. Authority upon the correct course of practice is meager, but in *Strange v. Collins*, 2 Ves. & B., 162, it was held by Lord Eldon that where a supplemental answer contained not only the new matter which the party had obtained leave to allege, but also other matter which was contained in a former answer, the supplemental answer could be ordered off the file, on motion. In the case at bar, the pleading involved is an amended and not a supplemental answer, but that ought not to make any difference in the application of a rule of practice.

It is understood to be true, as claimed by counsel for defendant, that exceptions to this answer could not, in the present

aspect of the case, be filed without leave. *Barnes v. Tweddle*, 10 Sim., 481. But I hardly think that leave of the court was a necessary prerequisite to a motion to strike the pleading from the files. On the whole, I am of the opinion that whether that motion can be ultimately sustained on its merits or not, the complainant cannot be regarded as in such default for want of a replication as to entitle the defendant to a dismissal of the suit.

The motion to dismiss will be denied; and, as it seems desirable that proper issue in the cause shall be joined without unnecessary delay, the motion to strike the answer from the files may be brought to a hearing on ten days' notice by either party.

BOUDEREAU v. MONTGOMERY.

(Circuit Court for Pennsylvania: 4 Washington, 186-190. 1821.)

STATEMENT OF FACTS.—This was a bill by a large number of persons who claim to be the heirs at law of Charles White, of Philadelphia, against his administrators. There were commissions issued to take depositions in Louisiana, and objections were taken to the evidence.

Opinion by WASHINGTON, J.

As to the last objections, that would be attended to by the court upon the report of the master, to whom it might be proper to refer the depositions, to inquire whether any and which of the interrogatories are leading.

The objections to the execution of the commission strike at the entire depositions, and being in my opinion well founded, the depositions themselves must be suppressed.

The commissioners act under a special authority, which it is not only their duty to pursue, but it should be made to appear to the court, by their own showing, that this authority was pursued. Whatever facts in relation thereto are stated in their report, the court is bound *prima facie* to give credit to; but the court cannot presume that they have duly executed their authority, when they are themselves silent upon that subject. It should particularly appear when and where the depositions were taken. As to the depositions taken at Iberville by P., not only out of his district but within the district of another commissioner, it is impossible that they can be supported, any more than if they had been taken by a person not authorized by the court to take them. And having thus furnished

the court with evidence of his total disregard of the authority given to him in those instances, I am well warranted in doubting, at least, whether he has been more attentive to it in others where he is silent as to the place at which the commission was executed.

Depositions were offered by plaintiffs taken in an ejectment suit in Baltimore, brought by some of their number against the administrators. They were objected to as *res inter alios acta*.

Opinion by WASHINGTON, J.

As *depositions*, the evidence is inadmissible, inasmuch as it was taken in a cause between different parties from those who are now before this court, though in relation to the same question. Were the plaintiffs the same, I think the objection would not hold, on the ground that Mr. Cross was not a party to the suit in which the depositions were taken, since Montgomery was, and as representing his co-administrator, as well as the estate of the intestate, he had every opportunity of cross-examining the witnesses.

NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

GASS v. STINSON.

(Circuit Court of Massachusetts: 2 Sumner. 605-612. 1837.)

STATEMENT OF FACTS.—This cause was before the master upon an interlocutory order, and an application was made to examine witnesses impeaching the competency of Noah James, a witness whose testimony had been before the court upon the hearing. There was an order made by the judge at chambers to take the depositions *de bene esse*, and the cause came up on a motion to supersede that order.

Opinion by STORY, J.

As the original application to the master was made orally, the precise grounds on which it was made do not appear, except from the master's certificate. This was a great irregularity; and the application should have been by petition in writing, verified (if not ordinarily, at least in a case of this sort) by affidavit. See *Troup v. Sherwood*, 3 John. Ch., 558, 566. The irregularity, however, was not then brought to my notice. The interrogatories proposed to be put to the witnesses were, however, filed in writing before the master; and an exception has now been taken to their purport and character. I shall presently have occasion to comment on them.

The application to supersede the order relies upon various grounds. The first one is that the application was founded upon a suggestion which is wholly incorrect, to wit, that James had not received a plenary pardon; whereas in fact he had received such a pardon, as appears by a copy of the instrument of pardon. This removes at once the whole of the original ground of the application, and undoubtedly entitles the plaintiff to have the order for taking the depositions superseded, since the witness was clearly competent.

But an attempt has been made to sustain the order upon the ground that the facts to be stated by the witnesses would go to affect the credibility of James. Upon looking into the interrogatories filed, it is impossible that they can be sustained for this or any other purpose applicable to the cause. The first three interrogatories are merely introductory, and point solely to the identification of James; and, in other respects, are immaterial and irrelevant. All the other interrogatories seek to establish, by the parol evidence of witnesses, that there was an indictment, trial, conviction and sentence of James for larceny; facts which should be proved by a production of the record itself, and which are not, in their character, proper to be established by the mere oral statements of witnesses. There is no ground upon which a party can be permitted to testify orally to the contents or purport of an indictment, or verdict, or judgment; for the best evidence is the original paper, or a certified copy. So that, if the interrogatories had been originally examined, they must have been suppressed, whether they applied to competency or to credibility.

But it is proper to say a few words as to the time and manner of presenting objections to the competency or credibility of witnesses in courts of equity. The general course of practice is that, after publication has passed of the depositions (though it may be before), if either party would object to the competency or credibility of the witnesses whose depositions are introduced on the other side, he must make a special application by petition to the court for liberty to exhibit articles, stating the facts and objections to the witnesses, and praying leave to examine other witnesses to establish the truth of the allegations in the articles by suitable proofs. 1 Harris, Ch. Pr. (by Newland), pp. 282, 283; Hinde's P. Ch., 374, 375; 1 Newl. Ch. Pr., 289, 290; Gibb. For. Roman., 117, 118. Without such special order, no such examination can take place; and this

has been the settled rule ever since Lord Bacon promulgated it in his Ordinances. Ord. 72; Beames' Ordin. in Ch., pp. 32, 187; *Mill v. Mill*, 12 Ves., 406. Upon such a petition to file articles, leave is ordinarily granted by the court, as of course, unless there are special circumstances to prevent it. There is a difference, however, between objections taken to the competency and those taken to the credibility of witnesses. Where the objection is to competency, the court will not grant the application after publication of the testimony, if the incompetency of the witness was known before the commission to take his deposition was issued; for an interrogatory might then have been put to him directly on the point. But, if the objection was not then known, the court will grant the application. 1 Harris. Ch. Pr. (by Newland), 282, 283; 1 Newl. Ch. Pr., 289, 290, 291; Hinde's Ch. Pr., 374, 375; *Purcell v. McNamara*, 8 Ves., 324; *Vaughan v. Worrall*, 2 Madd. Ch. Pr., 322; S. C., 2 Swanst., 400. This was the doctrine asserted by Lord Hardwicke in *Callaghan v. Rochfort*, 3 Atk., 643, and it has been constantly adhered to ever since. See *Purcell v. McNamara*, 8 Ves., 324; *Vaughan v. Worrall*, 2 Madd. Ch. Pr., 322. The proper mode, indeed, of making the application in such case seems to have been thought by the same great judge to be, not by exhibiting articles, but by motion for leave to examine the matter upon the foundation of ignorance at the time of the examination. *Id.* But upon principle there does not seem to be any objection to either course; though the exhibition of articles would seem to be more formal, and perhaps, after all, more convenient and certain in its results.

But where the objection is to credibility, articles will ordinarily be allowed to be filed by the court upon petition, without affidavit, after publication. *Watmore v. Dickinson*, 2 Ves. & Beam., 267. The reason for the difference is said by Lord Hardwicke (in *Callaghan v. Rochfort*, 3 Atk., 643) to be, because the matters examined into in such cases are not material to the merits of the cause, but only relative to the character of the witnesses. And, indeed, until after publication has passed, it cannot be known what matters the witnesses have testified to; and, therefore, whether there was any necessity of examining any witnesses to their credit. *Russel v. Atkinson*, 2 Dick., 532. This latter is the stronger ground; and it is confirmed by what fell from the court in *Purcell v. McNamara*, 8 Ves., 324.

When the examination is allowed to credibility only, the interrogatories are confined to general interrogatories as to credit, or to such particular facts only as are not material to what is already in issue in the cause. The qualification in the latter case (which case seems allowed only to impugn the witness' statements as to collateral facts) is to prevent the party, under color of an examination as to credit, from procuring testimony to overcome the testimony already taken in the cause, and published in violation of the fundamental principle of the court, which does not allow any new evidence of the facts in issue after publication. The rule and the reasons of it are fully expounded in *Purell v. McNamara*, 8 Ves., 324, 326; *Wood v. Hammerton*, 9 Ves., 145; *Carlos v. Brock*, 10 Ves., 49, 50, and *White v. Fussell*, 1 Ves. & Beam., 151. (The very form of the order is given in a note (*g*) to *Watmore v. Dickinson*, 2 Ves. & Beam., 268. See, also, 1 Madd. Ch. Pr., 320 to 325; *Piggott v. Croxhall*, 1 Sim. & Stu., 467.) It was recognized and enforced by Mr. Chancellor Kent, in *Troup v. Sherwood*, 3 John. Ch. R., 558, 562 to 565. When the examination is to general credit, the course in England is, to ask the question of the witnesses, whether they would believe the party sought to be discredited upon his oath. See *Purell v. McNamara*, 8 Ves., 324; *Carlos v. Brock*, 10 Ves., 49, 50; *Anon.*, 3 Ves. & Beam., 93; *Watmore v. Dickinson*, 2 Ves. & Beam., 267. But see *Gill v. Watson*, 3 Atk., 522. With us the more usual course is to discredit the party by an inquiry, what his general reputation for truth is; whether it is good or whether it is bad.

But examinations to the credit of witnesses are required to be made before the hearing; and it is quite too late to make the application after the hearing, and *a fortiori* after an interlocutory decree has passed upon the hearing, upon the footing of the evidence in the cause. So the doctrine was laid down by Lord Eldon in *White v. Fussell*, 1 Ves. & Beam., 151. The case of *Piggott v. Croxhall*, 1 Sim. & Stu., 467, manifestly implies the same doctrine; though the application was there made before the hearing. It seems to me, therefore, that upon this ground alone, the defendant is not now at liberty to examine witnesses before the master, to the credit of a person, whose testimony was read at the hearing without objection, the objection to his competency or credibility being then fully known. The defendant, by his conduct upon that occasion,

waived the objection, and he cannot in any subsequent stage of the cause renew it.

But it is said that, upon a rehearing, or an appeal from the decree at the rolls to the chancellor, new evidence is admissible to be read which was not read at the original hearing. That may be true under particular circumstances, as where it is evidence originally in the cause, but not read; or where it is evidence newly discovered since the hearing. On this subject, however, I do not dwell, because it was recently considered in this court in a case which underwent a good deal of consideration. I allude to the case of *Wood v. Mann*, 2 Sumn., 316. The case of *Needham v. Smith*, 1 Vern., 463, has also been relied on to show that a confession of a witness, which has come to the knowledge of the other party since the hearing, and which goes to his competency or credibility, is admissible on an appeal from the rolls. On that occasion it was also said, that if, after the hearing, a witness is convicted of perjury, the objection may be taken advantage of upon a rehearing. But, giving the fullest effect to this doctrine, it only applies to a case strictly of a rehearing (for an appeal from the rolls is only a rehearing. *East India Company v. Boddam*, 13 Ves., 421; *Buckmaster v. Harrop*, 13 Ves., 456), where the whole cause is opened anew; and where the evidence is already in the cause, or has been brought out since the former hearing. The present is not such a case.

It has been suggested by the counsel for the plaintiff, that if a defendant cross-examines a witness, knowing his interest, it is a waiver of the objection. The case of *The Corporation of Sutton Colfield v. Wilson*, 1 Vern., 254, certainly supports this proposition. It has been thought to go farther, and to decide that a mere cross-examination upon the merits is a waiver of any objection to his competency. But this has, as a matter of general practice and doctrine, been overturned by the more recent decision in *Moorhouse v. De Passou*, 19 Ves., 433; S. C., Coop., 300: in which it was held that in equity the cross-examination of a witness, in utter ignorance of his having given an answer to an interrogatory, showing that he has an interest in the cause, cannot amount to a waiver of the objection to his competency. In our practice at least, where the objection is actually known, and may be taken at the time of the cross-examination, it might deserve consideration whether the case in *Vernon* ought not to be adhered to. But

I do not, as it is unnecessary, give any opinion on this point. But see on this point *Harrison v. Courtweld*, 1 Russ. & Mylne, 428, and *Pigott v. Croxall*, id., 428, note.

It is suggested, in the argument of the defendants' counsel, that James is to be examined anew before the master, without any special order of the court. If this is so, certainly it is an irregularity, and his examination upon a proper motion may be suppressed. The case of *Rowley v. Adams*, 1 Mylne & Keen, 543, is directly in point. But if his former deposition, only, is to be read in the hearing before the master, that is all proper, for the evidence already in the cause is for the consideration of the master.

Upon the whole, my opinion, in every view of the matter, is, that the order ought to be superseded; and it is accordingly superseded.

ESLAVA v. MAZANGE.

(Circuit Court for Alabama: 1 Woods, 623-627. 1871.)

Opinion by BRADLEY, J.

STATEMENT OF FACTS.—The bill is filed in this case to subject certain property, conveyed by the complainant to Ovid Mazange many years since, to a parol trust, in favor of the complainant, on which, as he alleges, the conveyance was made. The Bank of Mobile is made a defendant because it has an execution against Eslava which has been levied on the property in question. On filing the bill and before issuing the subpoena, the complainant obtained an order to examine himself and his wife as to any transactions with or statements by Ovid Mazange, deceased, upon interrogatories to be served on the parties to the suit, or upon notice to them, before some commissioner of the United States. The rule suggests that Eslava and his wife are aged and infirm, and reside in New Orleans.

As soon as issue was joined in the cause, the defendants gave notice to the complainant that they desired the testimony in the case should be taken orally, under the sixty-seventh rule of the court, and soon after filed written objections to taking the testimony of the plaintiff and his wife on the grounds, amongst others, that the complainant was not a competent witness in the case (Mazange being dead), and that the wife could not be a witness for her husband. The complainant's counsel, nevertheless, after this, proceeded to file and serve

interrogatories with a view to examine the complainant and his wife on commission. The defendants filed cross-interrogatories under protest. The examination having been taken and the depositions returned, the defendants at the last term moved to suppress the same. The motion, not being disposed of, is now repeated. One ground of the motion is, that the complainant and his wife are not competent witnesses in the case.

In general, the competency of witnesses in the United States courts in civil cases is governed by the law of the state in which the court is held. Such was the rule enacted by the statute of July 6, 1862 (12 Stat., 588). But congress has specially regulated the subject now before the court. By the act of July 2, 1864 (13 Stat., 351), it was declared, amongst other things, that there should be no exclusion of any witness in the federal courts because he was a party to, or interested in, the issue tried. This act was modified by that of March 3, 1865 (13 Stat., 533), by which it was enacted that in actions by or against executors, administrators or guardians, neither party should be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. This act is a recognition of the glaring injustice it would involve, to permit one party to propound himself as a witness in his own behalf as to a transaction between him and a deceased person, who can no longer give his version of the affair. If the law were to allow a man to wait until his antagonist were dead, and then to sue his heirs, and put himself upon the witness-stand and give his version of the affair, with no one to contradict or qualify his testimony, it would be as gross a prostitution of the forms of law, as to allow a man to be *judge* in his own cause.

Every honest mind revolts against it. There may be special cases, it is true, in which the court can see that no injustice would be done by calling on a party to testify, even though his adversary be deceased. But it is useless to attempt to anticipate such cases. When they arise it will be for the court, and not the party himself, to suggest that he be called. Or, if he make the suggestion, the other party ought at least to be heard upon it.

It is claimed in this case that the court has made an order

to take the testimony. But how was it made? It was an *ex parte* order taken before the defendants were subpoenaed to appear in the cause. When the statute authorizes such testimony to be taken if "required by the court," it does not refer to such a requirement or order as that which was made in this case. If an *ex parte* order can be got in this way, the statute would be practically abrogated. The reservation of power in the court to *require* the evidence to be taken was made in order to provide for such extreme and special cases as might arise, in which it would be a great hardship not to take it. The court will exercise this power with great care and caution.

This case is one in which it would be eminently improper to allow the evidence. The complainant seeks to set up a parol trust in property conveyed away by him over twenty years ago, and possessed by the grantee and his assigns ever since. It would be most dangerous to allow a party to prove his own case under such circumstances, after his grantee was dead. Whether it is provable at all is another question, not now before the court. But no man's property would be safe under such a rule of evidence. Of course, the wife is incompetent to testify for or against her husband.

The fact that the Bank of Mobile has filed a cross-bill in the case can make no difference. The order to examine the parties is taken on behalf of the complainant, not on behalf of the bank, and, if it were taken on behalf of the bank, it would not help the case. The bank is not the "opposite party" referred to in the act who is authorized to call the plaintiff as a witness. The "opposite" party meant is that party against whom the evidence is sought to be used. The interests of the complainant and of the bank in the matter are the same. The testimony is clearly incompetent and must be disallowed, and the depositions suppressed.

It is urged that the witnesses were old and infirm, and, therefore, that the order to take their testimony was strictly regular under the seventieth rule in equity. That rule was not originally intended for the examination of a party; and it may be questioned whether, under any circumstances, it ought to be extended to the case of a party propounding himself as a witness. But it certainly cannot legalize testimony taken as the plaintiff's has been taken in this case.

It may also be urged that the order for taking the testimony

must stand until it is regularly discharged. It is undoubtedly the general rule that, after the close of the term in which an order is made, it stands until it is regularly discharged. But orders obtained upon motion may be discharged upon motion; and *a fortiori*, orders obtained *ex parte* may be thus discharged which have never been assented to, but always resisted by the other party; and a motion to suppress depositions fairly brings up the regularity of an *ex parte* order directing them to be taken, as well as the competency of the witnesses examined, if the party moving to suppress has never done anything to waive the objection. From an examination of the minutes and files in this case, I am satisfied that the defendants have taken every opportunity fairly in their power to express their opposition to the testimony of these parties, as well as to the taking of it by deposition.

The motion to suppress the depositions will be granted; but, as they were taken under an order of the court, though an irregular order, the cause will be continued until the next term, and the time for taking testimony enlarged until the rule day in September, to enable the complainant to take other testimony in the cause, with like liberty to the defendants.

KELSEY v. HOBBY.

(16 Peters, 269-280. 1842.)

Opinion by TANNEY, C. J.

STATEMENT OF FACTS.—This is an appeal from the decree of the circuit court for the district of South Carolina. It appears from the record that Kelsey, M'Intyre and Hobby, for some time previous to the 9th of February, 1822, carried on business in Georgia, as merchants, under the firm of C. Kelsey & Company; and it having been agreed among the partners that Hobby should withdraw from the firm, they, on the day above mentioned, entered into the following agreement:

“Articles of agreement entered into at the dissolution of the firm of C. Kelsey and Company, between Alfred M. Hobby, of the first part, and Charles Kelsey and Charles M'Intyre, of the second part, witnesseth: That the said Alfred M. Hobby doth agree to withdraw from the said firm upon the following conditions, viz.: that the said parties of the second part are to take upon themselves the entire settlement of the business of the said firm, and are to pay to the said A. M.

Hobby, after the debts of the said firm are all paid and discharged, and a sufficient sum collected out of the debts now due to the said firm, \$5,500, and in Bridge bills whenever he shall demand them, \$1,130. And the said A. M. Hobby, for said consideration of the above sums of money to be paid, and the further sum of \$1 to him in hand paid, the receipt whereof is hereby acknowledged, hath relinquished, and by these presents doth transfer, to the said parties of the second part, all his interest or claims of whatever nature he has, or may have, as partner in the said firm. It is also stipulated and agreed, that the said A. M. Hobby of the first part, in consideration as above specified, is to protect the said parties of the second part from a certain judgment obtained against said firm by the branch of the United States Bank, in this city, and to hold them harmless from any balance, should there be any due, after the conclusion of the settlement between John M'Kinnie and Thomas Gardner, respecting the said judgment. And for the faithful discharge of this agreement, we bind ourselves, our heirs, executors, administrators or assigns."

At the time this agreement was executed, an inventory was taken of the assets and debts of the firm, by which it appeared that the goods and property on hand, together with the debts due to the partnership, were estimated at \$38,164.96; and that the debts due from it amounted to \$26,057.91, and that this schedule formed the basis of the agreement. In November, 1829, Hobby filed his bill against Kelsey and M'Intyre, charging that there was a surplus of partnership effects, after paying all the debts, sufficient to satisfy the \$5,500 mentioned in the contract, as well as the Bridge bills, and praying an account. These Bridge bills were notes issued by a company who had built a bridge in the state of Georgia; and these notes circulated as money, but at a heavy discount.

On the 7th of February, 1830, M'Intyre put in his separate answer, in which he denies that the assets of the partnership produced the surplus charged by the complainant; and exhibited an account according to which the funds of the partnership realized only \$29,580.83, the debts paid amounted to \$28,874.66; and he insisted that large sums were also paid by them for interest on the debts of the firm, and heavy expenses incurred, which were not introduced into this account, but for which Kelsey and M'Intyre ought to be allowed credit; and that when these sums were added, they would amount to con-

siderably more than had been collected, and that, in addition to this, they are entitled to an allowance of two and a half per cent. on all sums collected and paid by them. He also averred that Hobby did not perform his part of the agreement, and that an execution was afterwards issued by the branch of the United States Bank, and the goods of Kelsey and M'Intyre seized for the debt against which Hobby had covenanted to save them harmless; and that, by reason of that execution and seizure, they were put to great expense, and were seriously injured in their credit and embarrassed in their business as merchants; and insisted that they were absolved from their agreement by the failure of Hobby to perform his part. The answer further stated that although Kelsey and M'Intyre denied the right of the complainant to the Bridge bills he claimed, yet they were willing to give him an order for them on the attorney in whose hands they had been placed for suit, and who had prosecuted the claim to judgment. That the respondent had always been ready to account with the complainant, Hobby, and to deliver him these bills, but that no demand was made until this suit was about to be instituted.

Kelsey, the other respondent, had removed to New York, a short time before the bill was filed, and his answer was not put in until January 10, 1838. This answer is in substance the same with that of M'Intyre, to which it refers.

There was a general replication to these answers, and the accounts referred to a master, by order of the court; when his report came in, many exceptions were filed to it on both sides; and upon hearing, the court set aside the report, and returned it again to the master, with directions as to the principles on which it was to be stated. A good deal of testimony was taken on both sides, and the master made a second report at April term, 1839, according to which the respondents had paid \$2,031.05, beyond the assets which came to their hands. Many exceptions were again filed on both sides to this report, and it was by order of the court again returned to the master, with directions to take further proof as to one of the items in controversy.

In the latter end of August, 1839, while the accounts were pending before the master, as hereinbefore mentioned, Hobby went to New York, where Kelsey resided and was carrying on business; and a few days after he arrived there, he was arrested at the suit of Kelsey and M'Intyre, upon a claim for

\$4,000 as damages for not having saved them harmless against the debt due the Branch Bank of the United States, according to his covenant in the agreement hereinbefore mentioned. It seems that Kelsey was advised by his counsel in New York that this claim could not be allowed him in the chancery suit, because the damages were unliquidated. Being a stranger in the city, he found difficulty in procuring special bail. But an acquaintance whom he had occasionally met in society, and to whom he applied, entered into a bail bond to the sheriff, conditioned that he would appear to the suit and put in special bail within twenty days after the 4th of September then next ensuing; Hobby assuring him that he expected some of his southern friends to be in New York in a few days, and that he would then be able to relieve him. The party who thus became his security informed Hobby, in the presence of the officer in whose custody he was, that he could not justify as special bail; and he was not, therefore, accepted as security in the bond until the officer consulted Kelsey's counsel and received his consent.

The southern friends of whom Hobby spoke, when they arrived, offered to become his special bail, but not living in the state of New York, they could not be taken without the consent of Kelsey. And Hobby remained in New York, unable to procure special bail until the 6th of September, when he signed an admission of the correctness of an account concerning the whole controversy in the circuit court, which had been prepared some time before by one of Kelsey's clerks. According to this account, Kelsey and M'Intyre had paid \$15,859.73, under the agreement with Hobby, beyond the amount of the partnership funds that came to their hands. And at the same time that he signed the account he executed the following release:

Account of C. Kelsey and Company with the old Concern of C. Kelsey and Company. United States, South Carolina District. Being Sixth District, United States.

A. M. Hobby and Thomas C. Bond	} Now pending before said court.
<i>v.</i>	
Charles Kelsey and Charles M'Intyre,	
In Chancery.	

In this case, the parties, Alfred M. Hobby and Charles Kel-

sey, have come together, and examined the subject-matter in dispute, and they find the within account correct, and it is hereby admitted to be correct, and every entry in it. And they do not deem it just or equitable that said suit should be further prosecuted. And in consideration of the premises, and \$1 paid, the parties in said suit hereby discharge each other from all demand in the same. And each party releases and discharges the other from all demand of every name and nature, and agree that the said suit should be discontinued. As witness our hands and seals, this 6th day of September, 1839.

A. M. HOBBY, [L. s.]

C. KELSEY. [L. s.]

Witness to the signatures and seals of A. M. Hobby and C. Kelsey :

GEO. H. KELSEY,

B. A. HEGEMON.

This release was attached to the account settled at the same time ; and a letter written by Hobby to his counsel, and shown to Kelsey, stating that they had come to a settlement, and directing the suit in chancery to be discontinued ; and Hobby was thereupon discharged from the arrest, and shortly afterwards left New York.

On the 8th of January, 1840, the release and settlement above mentioned were produced in court by the solicitors for the respondents, and a motion thereupon made to dismiss the bill. This motion was resisted on the part of the complainant, but the particular grounds upon which it was objected to are not set forth. The order of the court merely states that the release was impeached by the complainant's counsel, and authorizes both parties to take testimony in regard to the settlement and release. Under this order, sundry depositions were taken and returned on the part of the complainant, to show that the settlement and release were without consideration, and that they were extorted from him by the arrest under which he was detained in New York ; his southern friends and acquaintances being refused as bail, because they did not reside in the state, and he being unable to leave the city until the temporary bail he had procured was discharged. And sundry depositions were also taken and returned on the part of Kelsey, to show that there was no harshness or oppression on his part, and no undue advantage taken of Hobby ;

and that the settlement and release were freely and voluntarily made.

The case came on for final hearing on the 30th of May, 1840, upon the report of the master, and the exceptions filed to it on both sides. The report, which stated, as before, a balance of \$2,031.95, in favor of Kelsey and M'Intyre, for payments and allowances made to them, over and above the sums realized by them from the partnership effects, was set aside by the court; and upon the testimony in the cause, the court proceeded to pass a decree in favor of the complainant for \$5,500, with interest, and for the Bridge bills mentioned in the agreement, and allowing to the respondents a set-off of \$300, for the damages sustained by reason of the execution issued against them by the Branch Bank of the United States, as hereinbefore stated. From this decree the respondents appealed to this court. This statement of the facts in the case may appear to be tedious; but from the nature of the proceedings it is necessary, in order to show how the points arose which were made in the argument in this court.

The appellants contend that the court of chancery had no jurisdiction beyond that of compelling a discovery of the amount which Kelsey and M'Intyre had received under the agreement; and that if anything was found due from them to Hobby, he was bound to resort to his action at law on the covenant in order to recover it. But the court think it was a very clear case for relief, as well as discovery in chancery. It is true he had ceased to be a partner, but the appellants had received the assets of the partnership upon a trust that they would collect them and pay the debts, for which Hobby was liable as well as themselves; and would pay over to him the sum before mentioned as soon as they collected enough for that purpose after the payment of debts. He was, therefore, entitled to an account; and if upon that account anything was found due to him, he was, upon well-settled chancery principles, entitled to relief also.

Neither can the objection be sustained as to the mode in which the amount due was ascertained. It is true, that according to the ordinary mode of proceeding in courts of equity, instead of setting aside the report of the master, the court should have passed its judgment upon each of the exceptions, or have remanded the account to the auditor, with additional directions as to the principles upon which it was to be stated.

And if it had been necessary to ascertain precisely the amount which the appellants had collected over and above the debts they had paid, the proceeding adopted by the court would have been liable to the objections urged against it. For the decree could not in that case have been reviewed in the appellate court, and the exact balance ascertained, unless the record showed what items were allowed and what disallowed in the inferior court. But this is not a case of that description. If the appellants had received the sum claimed by Hobby beyond the amount of debts paid, it mattered not how much more they had received; and the case did not require a statement of the exact amount. And as the evidence, and accounts, and exceptions, are all in the record, this court can determine whether the sum mentioned is proved to have been collected or not. And if it appears to have been received, the decree must be affirmed, even although it may happen that items allowed by the circuit court are disallowed here; or items disallowed by that court are determined here to be correct and properly chargeable. And, as all the testimony is before us, and the exceptions show all of the disputed items, neither party can be taken by surprise.

It would extend this opinion to a most unreasonable length, if the court were to enter upon a particular and detailed examination of the various disputed items, and of the testimony and calculations relied on by the parties to support their respective claims. Fourteen exceptions were taken to the auditor's report by the complainants, and six by the defendants; and the evidence upon which they depend is voluminous. Four of them require a particular examination and comparison of different accounts, in order to arrive at a just conclusion. We have looked into the whole testimony very carefully, and unless the release and settlement in New York is to be regarded as conclusive, we are satisfied that Kelsey and McIntyre have received from the partnership assets beyond the amount paid for debts, a larger sum than that decreed against them by the circuit court.

This brings us to examine the release, and the account stated at the time it was given.

Some objections have been made as to the manner in which the release was introduced into the proceedings. It was filed in the cause, and a motion thereupon made to dismiss the bill; and it is said that being executed while the suit was pending

and after the answers were in, and the accounts before the master, it should have been brought before the court by a cross-bill or supplemental answer, and could not in that stage of the proceedings be noticed by the court in any other way. It is a sufficient answer to this exception to say that it was admitted in evidence without exception, and both parties treated it as properly in the cause; and the complainant proceeded to take testimony to show that it was obtained from him by duress, and the defendants to show that it was freely and voluntarily given. It had the same effect that it would have had upon a cross-bill or supplemental answer, and the complainant had the same opportunity of impeaching it. And there is no propriety in requiring technical and formal proceedings, when they tend to embarrass and delay the administration of justice, unless they are required by some fixed principles of equity, law, or practice, which the court would not be at liberty to disregard.

The release and account being therefore regularly before the court, we proceed to inquire into their legal effect, and the degree of weight to which they are entitled. The effect of a release, executed in consideration of the settlement of accounts between the parties, is clearly stated in Story's Equity Pleadings, 529, § 685. If the account is impeached, the release will not prevent the court from looking into the settlement; and the release in such a case is entitled to no greater force in a court of equity than the settlement of the account upon which it was given. In the case before us, the settlement of the account was the only consideration for the release.

The complainant, who resides in Georgia, and who had gone to New York upon business, was unexpectedly arrested for a claim which was then pending between the same parties in the circuit court of the United States for the district of South Carolina. The suit was brought for damages alleged to have been sustained by the failure of Hobby to indemnify the appellants against the claims of the Branch Bank of the United States hereinbefore mentioned. It is true that the plaintiffs in the suit were advised by counsel that they could not be allowed for these damages in the proceeding in equity, because they were unliquidated; and they ought not therefore be held accountable for that error. Yet it is very clear that the suit should not have been brought; because these damages formed one of the items in controversy between the

parties in the suit in chancery, which had been so long pending between them. And that court had not only jurisdiction over the subject, but it was bound to ascertain and allow them before it could adjust the account and grant the relief to which the complainant was entitled. The mode by which a court of chancery ascertains the amount in cases of that description, is either by a reference to the master or by sending an issue of *quantum damnificatus* to be tried by a jury. The cases upon this subject are collected and arranged in 2 Story's Commentaries on Equity, c. 19, p. 104. And the damages in question were in fact ascertained by the court, and deducted from the amount due to Hobby in the decree now under examination. But, nevertheless, as Kelsey in this respect acted by the advice of his counsel, if the settlement which afterwards took place had been confined to the claim he was seeking to enforce, the agreement between the parties to fix the damages at any particular amount would have bound Hobby, unless it was evidently unreasonable and exorbitant, or he could prove it was obtained by improper means.

The mere circumstance of his being detained in New York, by reason of the process issued to recover the amount claimed, would be no objection to the validity of the agreement. But while Hobby was detained in the manner before stated, and unable to procure special bail, Kelsey obtained from him a release of matters not embraced in this suit, and much more important in amount, and which Hobby had been insisting on for years, and for which he was prosecuting a suit in the circuit court. Neither the circumstances under which the release was taken and the account connected with it settled, nor the contents of these papers, can entitle them to weight in a court of equity. There is no evidence of any negotiations between the parties respecting this arrangement previous to the interview at which these papers were signed. Upon that occasion one of the clerks of Kelsey was present. He is one of the witnesses to the release. He does not say who proposed a settlement, but he states that the account admitted by Hobby had been prepared a long time before by one of Mr. Kelsey's clerks; that the examination of the account did not take more than ten minutes. And the interview at which it was acknowledged and signed, and the release executed, and a letter written by Hobby to his counsel in South Carolina to discontinue the suit against Kelsey and M'Intyre, did not last more than an hour.

This is the testimony of the witness. No books or papers appear to have been produced, or to have been in the city of New York at the time, in the possession of either party, except the account produced by Kelsey and signed by him and Hobby. And yet the release states that the parties had "come together and examined the subject-matter in dispute," and found that account correct, and thereby "admitted it to be correct and every entry in it." And the account, too, which is thus admitted, contains items for "exchange paid," "loss by discount on money received in collection of the partnership debts," "rent for counting-room," traveling expenses, postage, clerk hire, incidental expenses, and sundry others which would have required much time to examine, and the production of many vouchers before Hobby could have known whether they were correct or not. The account in important particulars differs from the one on which Kelsey and M'Intyre had themselves relied in the circuit court of South Carolina; and is more unfavorable to Hobby by about \$20,000, than the one which Hobby had been so long insisting on in his suit. Such an account and release, executed under such circumstances, are not entitled to the consideration and weight which belong to instruments freely executed, and with opportunities of knowledge and examination. So far from strengthening the claims of the appellants, they, in the judgment of the court, are calculated rather to bring suspicion upon them. They certainly cannot outweigh the testimony taken in the chancery proceedings, and the decree of the circuit court is therefore affirmed.

DEXTER v. ARNOLD.

(Circuit Court for Rhode Island: 2 Sumner, 108-132. 1834.)

STATEMENT OF FACTS.—Bill in equity to redeem a mortgaged estate. The case came on to be heard on the report of the master, to whom the cause was referred for an account. The report of the master is very long, and there were numerous exceptions to it, filed by both parties. The general facts in the case appear in 1 Sumner, 109, to which reference is made.

The exceptions of the plaintiffs are: (1) That the master stated that there was due on the mortgage \$1,366.36, whereas there was nothing due. (2) That the master should have inquired into the original consideration of the mortgage, which

he declined to do. (3) That the master allowed to defendants the full amount of the supposed consideration, which he should not have done. (4) That the master allowed a deduction to the mortgagee from the rent of the premises, because they became dilapidated while in his hands, whereas he should have charged the full annual value, deducting a proper sum for repairs. (5) That the master charged nothing to the mortgagee for the dilapidation of the buildings while in his possession. (6) That the master charged nothing to the mortgagee on account of a note for £100, which it is alleged was twice paid to the mortgagee. (7) That the master refused to allow plaintiffs \$192, paid by mistake to the mortgagee for insurance on the schooner *Fame*,⁶ no such sum being due for insurance. (8) That the master refused to charge the defendants with \$573.87, paid to the mortgagee to take up Rogers' note against the mortgagor, and to receive evidence on that subject. (9 and 10) Other sums which the master refused to allow. (11) That the master made improper charges of interest. (12) That the master did not require of defendants the production of the cash books of the mortgagee. (13) That the master refused to permit plaintiffs to examine such books as he did require defendants to produce. (14) Unimportant. (15) That the master refused to receive evidence impeaching the account of 1801. (16) Unimportant.

The defendants' exceptions to the report, cited by the court in the opinion: (1) That the complainants were allowed one-third of the amount received for the Fox Point lots. (2) That the master has charged the estate of Thomas Arnold with rents that were never received by him. (3) That the master allowed a larger amount of rents than are contained in the accounts of the administratrix.

The other exceptions of the defendants were unimportant.

Opinion by STORY, J.

The exceptions have been argued by the learned counsel at large, but our opinion will be briefly stated upon all of them, as we do not think that they involve any serious difficulty. We shall first consider the exceptions of the plaintiffs.

1. The first exception is utterly unmaintainable. It is too loose and general in its terms and points to no particulars. It comes to nothing, unless specific errors are shown in the report, and those errors, if they exist, should have been brought directly to the view of the court in the form of the

exception itself. At present it amounts only to a general assignment of errors, and the argument on this exception has shown none.

2 and 3. The second and third exceptions apply to the refusal of the master to inquire into the original consideration of the mortgage. Under the circumstances the master was perfectly right. In the first place, in the account settled between the original parties, on 31st of March, 1801, the mortgage was treated as a good subsisting mortgage for the full amount of the debt stated therein. In the next place the bill does not charge that the consideration of the mortgage was nominal, or less than the amount stated therein; or that there is any error or mistake therein; neither does it ask for any examination or overhauling of the original consideration upon any alleged error or mistake. It was clearly, therefore, a matter not properly in issue before the master. See *Chambers v. Goldwin*, 9 Ves. Jr., 265, 266.

5. The remarks dispose also of the fifth exception, which is founded upon the supposed dilapidations of the buildings while in possession of the mortgagee. There is no proof whatever that these were caused by his wilful default or gross negligence; but they were the silent effects of waste and decay from time.

6, 7, 8, 10. The sixth, seventh, eighth and tenth exceptions are disposed of by two simple considerations. (1) They all relate to matter which had been already disposed of in a former suit (*Dexter v. Arnold*, 5 Mason, 304). (2) If Thomas Arnold (the intestate) was accountable at all for any of these matters, he was so in a suit brought against him as agent or administrator of Jonathan Arnold, and not in this suit, which is merely a bill to redeem a mortgage.

11. The eleventh exception proceeds upon the objection that the master has allowed interest where none was due. This exception proceeds upon the supposition that the second and third exceptions were well founded. We have already decided that the master was right in holding the consideration stated in the mortgage deed to be the true sum due, as ascertained in the account settled in 1801.

12. The twelfth exception is, because the books of Thomas Arnold were not produced before the master, or required by him to be produced. This is founded in a clear mistake, for the affidavits of Anna Arnold and James Arnold establish the fact that they were produced.

13. The thirteenth exception is to the supposed denial to the plaintiffs of the right of examining the books of Thomas Arnold, produced under notice before the master. This exception has no facts on which to rest it in the master's report. The plaintiffs had no right to examine those books generally; but only such parts as related to entries, charges and accounts relative to the matters in controversy in the suit. If we pass aside from the master's report, it appears by the affidavits already alluded to that a full examination as to these matters was allowed, so far as any of the books contained entries, charges or accounts relative thereto.

14. The fourteenth exception is, that the report states no reason for the refusal of Samuel G. Arnold to join in making repairs on the premises. That was not necessary. It was mere matter of evidence for the consideration of the master, in examining the point, whether there was any wilful default or gross negligence of the mortgagee in not making repairs upon the premises.

3. The third exception is, that the master has allowed a much larger amount of rents than is contained in the accounts of the administratrix of the mortgagee and admitted to have been received by him. We are of opinion that the master was right, for the reasons stated by him. The mortgagee kept no regular accounts; and the master has, therefore, been compelled to exercise a sound discretion upon the whole evidence as to the amount with which he should be charged for rents and profits. The doctrine contained in *Hughes v. Williams*, 12 Ves. Jr., 493, and in *Williams v. Price*, 1 Powell on Mort., by Coventry & Rand. 949 (a), note; S. C., 1 Sim. & Stu., 581, and *Anonymous*, 1 Vern., 45, shows the true grounds on which courts of equity proceed in cases of this nature.

4. The fourth exception insists that the master should not have estimated the rents for which the mortgagee is charged upon his general judgment; but should have charged only such a rent as might have been obtained by a letting at public auction. We think otherwise. The master was bound to charge the mortgagee with a reasonable rent. What, under all the circumstances, was a reasonable rent was matter for the exercise of a sound discretion, upon all the circumstances of the case. An auction rent would not in many cases afford either a just or a satisfactory standard of the real value for which the premises might be let, or at which the mortgagee should be entitled to occupy them.

5. The fifth exception is that the master has reported that Thomas Arnold kept no regular accounts, which is an incorrect statement. We see no proof of that. The master was the proper judge of that fact upon examining the books and the other evidence in the case. There is no evidence before us that establishes in the slightest degree that his conclusion was incorrect.

6. The sixth exception is founded on the supposed incorrectness of the charge of cellar rent. But there is not any evidence whatsoever upon the face of the report which shows any such error of the master; and, therefore, the report must stand. We cannot presume errors, or go into evidence in support of them which was not laid before the master, or brought by him to the notice of the court. Exceptions must be made to matters apparent upon the face of the report, or upon the accompanying documents and proofs laid before the court upon the allegations and objections of the parties.

7, 8, 9, 10, 11. All the other exceptions are founded in objections to the master's estimate and allowance of rents charged against the mortgagee. We are of opinion that, upon the circumstances stated in his report, that estimate was perfectly just and reasonable. It was a matter for his judgment; and there are no facts in the case which impugn the propriety or soundness of his conclusions.

Upon the whole, our judgment is that all the exceptions on both sides ought to be overruled and the report ought to stand confirmed.

Decree accordingly.

NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

STORY v. LIVINGSTON.

(13 Peters, 359-377. 1839.)

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This cause having been before this court at its term in 1837, it was then decreed that the decree of the district court, dismissing the bill of the complainant, should be reversed; that the cause should be sent back for further proceedings in the court below, with directions that it should be referred to a master, to take an account between the parties. The mandate then recites the principles upon which the account was to be made; provides the time within which

any sum that may be found to be due to either of the parties should be paid after the entry of a final decree in the court below; directs, if a sum shall be found due to the complainant, a surrender and reconveyance of the property from the defendant to the complainant, or to such person or persons as shall be shown entitled to the same; and further orders, in the event of a sum being found to be due to the defendant, if it shall not be paid within six months after a final decree of the district court upon the master's report, that the property shall be sold by order of the district court, at such time and notice as the court shall direct, and that the proceeds be first applied to the payment of the balance due the defendant, and that the residue thereof be paid to the complainant.

In pursuance of the mandate, the district court appointed Duncan N. Hemen master, to examine into and report upon the account according to the rules and principles established in the judgment of this court. The master was sworn in open court, faithfully to perform the duties of his appointment. On the same day the master ordered a meeting to be held on the 6th of March, which was adjourned to the 8th; when he commenced the reference by taking testimony in behalf of the complainant, and it was adjourned to the next day. The meeting was then adjourned to the 24th March, when other testimony was taken; was then adjourned to the 1st April; thence, on the application of the defendant, was adjourned to the 15th April, and the reference was closed the day after. All the meetings were attended by the parties; the complainant being represented by counsel, and the defendant having been personally present, aided by counsel. After these proceedings were had, the defendant's counsel, in November following, obtained an order from the court upon the complainant, to show cause why the "suit should not be stricken from the docket, the bill of the complainant dismissed, or the suit abated;" which rule was returnable on the 1st December. The grounds relied upon to sustain this motion were: 1. That Edward Livingston, the former complainant, departed this life on — day of —, and before the hearing of the cause in this court at the spring term thereof in 1836.

2. The said Livingston departed this life before the making or enrollment of the decree at the spring term of the year 1836; consequently the court could not then entertain any jurisdiction of the cause.

3. This cause has never been regularly revived in the name of the present complainant; nor could it be so revived by the laws and usages of chancery practice, Mrs. Livingston claiming as a devisee. This rule was continued from time to time under sundry orders of the court, until the 18th of December, when the court rejected and overruled the motion. This motion we have noticed, not only because it was a singular attempt to oust the jurisdiction of the court over the cause after it had been decided on its merits in the supreme court, and the court below was acting under its mandate, but because from the time when it was made, and when the rule was granted, the defendant having not before objected to the reference to the master, and having joined in all the proceedings under that reference, it cannot be viewed in any other light than an attempt to prevent the master's report from being returned to the court, instead of contesting its conclusion, and the master's proceedings under the mandate, by regular exceptions. It presents an anomaly without any parallel in the history of chancery proceedings; placing an inferior tribunal, acting under the mandate of a superior, in the attitude of reversing the judgment of the latter; calling upon it to disregard the mandate altogether; to revoke its own proceedings under such mandate; and, in effect, to act in contradiction to the sole authority by which the district court was in possession of the cause. But the motion being overruled, on the same day the master presented his report to the court, which was read and filed. The following exceptions were then made to the report of the master by the defendant :

1. That chancery practice has been abolished by a rule of the court, and such proceeding is unknown to the practice of the court.

2. The master has erred in not allowing to the defendant the \$1,000, with interest, paid to Morse, or some part thereof.

3. The master's report does not show that it reports all the evidence taken before the master.

4. The master, in making his estimates and calculations, has not pursued the mandate of the court.

5. It appears, from the master's report, that the stores were rented from November to November; and he erred in assuming the 1st of April as the period of payment of annual rent.

6. A reasonable allowance should have been made to Story for the costs and risks of collecting rents.

7. The master erred in all his charges against the defendant; and failed to allow the defendant his proper credits.

All of these exceptions, except the third, are irregularly taken, and might be disposed of by us without any examination of them in connection with the master's report.

They are too general; indicate nothing but dissatisfaction with the entire report; and furnish no specific grounds, as they should have done, wherein the defendant has suffered any wrong, or as to which of his rights have been disregarded.

Strictly, in chancery practice, though it is different in some of our states, no exceptions to a master's report can be made which were not taken before the master; the object being to save time and to give him an opportunity to correct his errors or reconsider his opinion. Dick., 103. A party neglecting to bring in objections cannot afterwards except to the report (Harr. Ch., 479), unless the court, on motion, see reason to be dissatisfied with the report, and refer it to the master to review his report, with liberty to the party to take objection to it. 1 Dick., 290; Madd., 340, 555. But without restricting exceptions to this course, we must observe that exceptions to a report of a master must state, article by article, those parts of the report which are intended to be excepted to. Exceptions to reports of masters in chancery are in the nature of a special demurrer; and the party objecting must point out the error, otherwise the part not excepted to will be taken as admitted. *Wilkes v. Rogers*, 6 Johns., 566.

The court directed the master to amend his report, so as to state that it contained all the evidence given under the reference, which the master did by his certificate; and this disposes of the defendant's third exception. To that certificate the defendant's counsel did not object. In the subsequent proceedings in the court, upon the report, it was treated by both parties as conclusive of the fact that all the evidence had been disclosed in the report as it was originally made. The report was then before the court upon exceptions by the defendant, which were argued by the counsel of the respective parties; and the court overruled the exceptions on the 15th of January, and decreed the defendant to pay to the complainant, within six months from that day, \$32,958.18, the sum found by the master to be due by the defendant to the complainant; and further "decree that the master's report be in all other respects confirmed, and that the defendant conform to the

decree of the supreme court in the case." After this decree was made, the defendant filed a petition for a rehearing. The grounds taken in the petition are reasons against the confirmation of the report on account of the court's proceedings upon it, by which the defendant alleged he had been deprived of an opportunity to except to the report as it had been amended. That the cause upon the report had not been docketed regularly for trial, on account of the master's having taken testimony *viva voce*, when it should have been by depositions upon interrogatories; that the court in its decree had not disposed of the question of costs; and that the court, in its general direction to the defendant to do all things directed by the mandate of the supreme court, had left it uncertain to whom the defendant was to surrender and to convey the property. The court, after this petition had been answered by the complainant, heard an argument upon the motion. The judge finally overruled the application for a rehearing, and decreed that the defendant should surrender and reconvey the property described in the bill of complaint, to Louisa Livingston, widow and executrix, and devisee of Edward Livingston, deceased, and to Cora Barton, daughter and forced heir of said Edward Livingston, in conformity to the decree of the supreme court of the United States, and to the decree heretofore made, in pursuance thereof, by this court. This decree was made on the 6th of February, 1837. The cause is now regularly before this court, on an appeal from the decree of the district court, overruling the defendant's exceptions to the master's report, and confirming the same.

But before we consider the exceptions, we think it proper to notice the petition for a rehearing. Upon any matters in that petition, not directly touching the master's report, but assuming what this court did or did not decide or direct to be done by its mandate, it is only necessary to repeat what this court said in *Ex parte Story*, 12 Pet., 343. "The merits of the controversy were finally decided by the court, and its mandate to the district court required only the execution of its decree." As to the objection that the defendant had not an opportunity to except to the master's report as it was amended—it is founded upon a misconception of the fact; for the defendant's third exception, that the report did not show that it reports the evidence—the court simply allowed the master to certify that it did. If this certificate had not been allowed by the

court, the exception could not have prevailed, unless the several allegations, that the evidence did not appear in the report, had been accompanied by a specification of the particulars in which it was deficient.

On such an exception, supported by the oath of the party making it, or without oath if the opposite party joins in the exception without requiring the exception to be verified by affidavit, the court would call upon the master to report the evidence. We have noticed this exception as a point of practice. The truth of the exceptions not appearing on the face of the proceedings, and not being supported by affidavit or otherwise, the court cannot notice the exceptions. *Thompson v. O'Daniel*, 2 Hawk., 307.

The next objection in the petition for a rehearing, that the master, under the order of the court, did not possess the power to take testimony, and that, if he did possess such power, then it was irregularly exercised, because it should have been by depositions upon interrogatories, we notice also, as points of practice, not now to be settled, but which have been long since determined. In a reference to a master for any purpose, the order need not particularly empower him to take testimony, if the subject-matter is only to be ascertained by evidence. And in taking evidence, though the better plan is to take the answers in writing, upon written interrogatories, he may examine witnesses *viva voce*, the parties to the suit being present, personally or by counsel, not objecting to such a course (as was the case in this instance), and joining in the examination. Such is the general rule in chancery. In many, if not in most, of the states in this Union, however, it is the practice for the master to examine witnesses *viva voce*, and to take down their answers in writing. But the objection in both its parts is answered and overruled by the twenty-eighth rule of practice for the courts of equity of the United States. That rule provides for bringing witnesses before the master, for their compensation, for an attachment for a contempt, when a witness refuses to appear upon subpoena; and the last clause of it, allowing the examination of witnesses *viva voce*, when produced in open court. We think the same reasons which allow it to be done in open court permit it to be done by a master.

But it is said the decree of the district court does not provide for the payment of costs. This, too, is a point of practice

which, we remark, need not be a part of the decree or judgment, though it often is so; as the payment of them in most cases depends upon rules, and when rules do not apply, upon the court's order, in directing the taxation of costs.

We now proceed to examine the exceptions taken by the defendant to the master's report. The first: "That chancery practice has been abolished by a rule of the district court of Louisiana, and that such proceeding is unknown to the practice of the court," is not an exception to the report, but a denial of the propriety of the reference to the master; also of the court's authority to make such a reference under the mandate, and involves the assertion that the rule, if any such exist, may control the mandate and set it aside as a nullity. No such rule appears in the record. If any such exist, it certainly was disregarded in this instance (as it should be in every other by the court), or was not deemed applicable to a case like the one before it. We think the occasion, however, a proper one for this court to remark, if any such rule has been made by the district court in Louisiana, that it is in violation of those rules which the supreme court of the United States has passed to regulate the practice in the courts of equity of the United States. They are as obligatory upon the courts of the United States in Louisiana as they are upon all other United States courts; and the only modifications or additions which can be made in them by the circuit or district courts are such as shall not be inconsistent with the rules prescribed. Where the rules prescribed by the supreme court to the circuit courts do not apply, the practice of the circuit and district courts shall be regulated by the practice of the high court of chancery in England. The parties to suits in Louisiana have a right to the benefit of them; nor can they be denied by any rule or order without causing delays, producing unnecessary and oppressive expenses, and, in the greater number of instances, an entire denial of equitable rights.

The court has said upon more than one occasion, after mature deliberation upon able arguments of distinguished counsel against it, that the courts of the United States in Louisiana possess equity powers under the constitution and laws of the United States; that if there are any laws in Louisiana directing the mode of procedure in equity causes, they are adopted by the act of the 26th of May, 1824 (4 Stats. at Large, 62), and will govern the practice in the courts of the United States. 9

Pet., 657. But if there are no laws regulating the practice in equity causes, we repeat what was said at the last term of this court in *Ex parte Poultney v. City of La Fayette*, 12 Pet., 474: "That the rules of chancery practice in Louisiana mean the rules prescribed by this court for the government of courts of the United States, under the act of congress of May 8, 1792, chapter 137, section 2 (4 Stats. at Large, 275). These rules recognize the appointment of a master. The court below, in making this reference, acted under them and the mandate, and it could not therefore sustain the exception to the master's report. On the second exception we need only remark that the master apprehended rightly the decision and mandate of the court. The payment to Morse by the defendant was not considered an expenditure on account of the property nor on account of Livingston. It was intended to be excluded from the credits to which the defendant was entitled.

The third exception has been already disposed of. It was only a permission to the master to certify that his report contained all the evidence taken under the reference.

The fourth and seventh exceptions, on account of their generality and indefiniteness, may be considered in connection. The first of them is that the master, in making his estimates and calculations, has not pursued the mandate of the court; and the seventh is that the master erred in all his charges against the defendant and failed to allow the defendant his proper credits. In what particular the mandate has not been pursued is not stated. It is a general objection to the whole report, imputing to the master a misconception of the principles upon which the account was to be taken, and amounts to this, that, if the court shall see, upon the face of the report and the master's proceedings, error against the defendant, it will correct it, though no exception has been filed. In this view of it the defendant shall be protected, if the court shall detect error in the report. As to error in charges, and a denial of proper credits to the defendant, we remark that, without some specification of erroneous charge, and of disallowed credit, it is impossible to determine what the defendant objects to as a charge or claims as a credit. Was any credit refused which was claimed except that of the \$1,000 to Morse? That we have said, was rightly refused. Was he not allowed all other credits on the general account of expenditures? Did the defendant, whilst the reference was in progress, or after the

report upon it was made, claim any credit by the exhibition of any account? Did he ask to introduce any evidence to the master in support of any credit? Did he claim any other credit than such as are to be found in the account, giving on his own oath a statement of his expenditures, and of the rents of the property from 10th August, 1822, to the 26th January, 1829? Nothing of the kind appears.

On the contrary, there is in the report a statement by the master which is conclusive of the fact, as it has not been denied, that the defendant, though repeatedly called upon, and after having repeatedly promised to give an account, and having had five weeks to furnish it, refused to give any account.

The parties were summoned to the reference, by the master, on the 6th of March. On the 8th, the defendant Story appeared in person, accompanied by counsel. Upon his suggestion, however, that one of his counsel was absent from the city, and that he had been so much occupied as not to have had leisure to complete his account, with his request that the hearing should be postponed, though it was opposed by the complainant's counsel, the master adjourned the reference to give the defendant time to furnish his account, and to surcharge the account of the expenditures and rents up to the last of January, 1829. The right to correct any errors in that account was conceded to him; the account was given in evidence subject to such concession. Two witnesses were then sworn on the part of the complainant without objection and were examined by both parties. The meeting was then adjourned to the next day, the parties again attended, but the witnesses who had been summoned not being present, the defendant again suggested the propriety of adjourning for a few days, when he should be ready to present his account, which he had almost ready. It was assented to. The meeting was adjourned to the 24th of March. On that day the parties appeared before the master, a witness was examined on the part of the complainant, and the defendant again declared he had been prevented by important business from completing his account, and he requested a little more time to make it complete. The complainant's counsel consented to an adjournment to the 5th of April. On that day the defendant again requested further time; the case was continued to the 15th of April, and then defendant said he did not intend to furnish any account; but urged that, as the account of expenditures and rents up to

the last of January, 1829, had been received as evidence, it must be considered as conclusive of the expenditures which had been made on account of the property. This was allowed to be correct. We have then the refusal of the defendant to furnish an account, and proof that he did not claim any other credits than those in that account. With what propriety can a denial of credits be urged as an exception to the report? The defendant was the only person who could furnish an account of the credits to which he supposed himself to be entitled. He refused to do so. To allow him to say that there is error in the report, in this respect, would permit him to take advantage of his own wrong, and to defeat the complainant's rights by artifice. Nor is the account of expenditures and receipts up to the last of January, 1829, now examinable (except as to mere errors in computation), either as regards the principal or interest; the defendant being concluded by his admission of it, when he claimed the expenditures as a set-off against his own statement of the rents.

What has been said of the fourth and seventh exceptions applies to the fifth, which is, that a reasonable allowance should have been made to the defendant for the costs and risk of collecting the rents. If under the mandate any such allowance could be made, the claim for it should have been presented to the master, supported by evidence of what was the customary compensation for such services, if the service is not compensated by a law of Louisiana. A mere claim for a reasonable allowance cannot give a right to any, and of course is no valid exception to the report. It is the case of a party before a master, who merely claims for general expenses, without stating particulars. Under such a claim he will be allowed nothing. *Methodist Episc. Ch. v. Jaques*, 3 Johns. Ch., 81.

Six of the exceptions having been disposed of, the seventh only remains to be considered. It is, "that it appears from the master's report that the stores were rented from November to November, and he erred in assuming the 1st April as the period of payment of annual rent." It was said in argument, that computing the payment of annual rent in extinguishment of the defendant's debt, on the 1st April, is in effect to deprive him of interest for a part of the year, as the aggregate of the rent was not in fact received; that it is to allow interest upon rents and profits, contrary to the mandate and established decisions. This would certainly be so if the rent had only

been received at the end of the year. But if the rents were payable at intervals in the year, and were actually so received; and if the half, or any other portion of the ascertained annual rent, shall extinguish the interest upon the debt when it was received and reduce the principal, why should the whole debt continue to draw interest? Surely, to allow this would be to vary the obligations of these parties to each other, differently from what would be their respective rights in any other case of a debt drawing interest, upon which a payment has been made, which paid the interest and a part of the principal. Is there any difference in the effect of a payment, whether made in person by the debtor or if it arises from the income of his property?

The correct rule in general is, that the creditor shall calculate interest whenever a payment is made. To this interest the payment is first to be applied; and if it exceed the interest due, the balance is to be applied to diminish the principal. If the payment fall short of the interest, the balance of interest is not to be added to the principal so as to produce interest. This rule is equally applicable whether the debt be one which expressly draws interest or on which interest is given in the name of damages. *Smith v. Shaw*, 2 Wash., 167; 3 Cow., note *a*, 87. This, then, being the rule, if the fact is probable in this case that the income of the property received at any time in the course of the year did pay interest and a part of the principal, the defendant cannot complain; he being the receiver of the money, and refusing to give any account of the aggregate or its parts when received, if the master has taken a date for the computation of the aggregate rent as payment, which places the parties upon an equality. Besides, the mandate does not restrict the right of the complainant to a credit for the aggregate of the rent at the end of the year. It does not allow interest upon the rent, but directs the rents to be applied to the payment of the sums incurred in building and repairing; secondly, to the interest on the sums which have been advanced on the loan, or in the improvement of the lot; and thirdly, to the discharge of the principal of the loan. The fair inference from the silence of the mandate, as to the time when the rents are to be credited, is, that they are to be so when they are received, if the interest and part of the principal are paid. This is the general rule for the application of payments, and is the rule of equity which does substantial

justice. What, then, is the case of the defendant in this particular? He has a debt drawing five per centum interest, yielding annually \$1,135.55, and is in possession of the property of the complainant, giving a rent annually, after deducting \$700 for repairs and taxes, of \$8,000. But, it may be asked, by what means or evidence did the master ascertain the amount of rents, and that they were paid at such times and in such amounts as to justify the computation of the annual aggregate as a payment before the expiration of the year? First, he must have known that leases of houses are not made, either in Louisiana or elsewhere, for the payment of the entire rent at the end of the year; next he had an account made by the defendant, verified by his oath, showing that for seven years the rents of this property were received by him, principally in monthly payments; in the year 1828 altogether so; and then at intervals of two, three or four months in sums over \$1,700 up to \$3,000. The rents received in January and February, 1828, exceeded the amount of interest upon the principal debt or loan by \$600. The rent in that account received on the 26th January, 1829, was \$950, and the account states \$1,000 as due on the 1st of February, 1829. The amount of the annual rent the master ascertained from the tenants, who were witnesses before him, not to be less than \$8,000. Let it be remembered that the question now is, not whether the defendant shall pay interest upon rents and profits, but the time when he shall credit a payment upon the debt which discharges the interest and a part of the principal. His debt was carrying interest, and therefore his receiving the rents of the property at any time, in a sum sufficient to pay the interest and a part of the principal, should be applied at the date when it was received. The defendant could not claim an exemption from the operation of this general rule, in virtue of any relation between himself and the complainant, as trustee, bailiff, attorney or agent of the latter, who was always ready to pay when called upon, who had not mingled the rents with his own money, and not used it as his own, or that it had been kept on hand to abide the decree of the court. If he had been in either of these attitudes, especially the latter, his own oath, if not controlled by other testimony and the circumstances of the case, would have entitled him to a continued accumulation of interest upon the debt, without any credit of the rent, until the final decree had directed a sum to be paid

to the complainant. Under the circumstances of this case, the defendant refusing to give any account, yet admitting that he had received the rents at intervals in the year; when we consider such to be the usual way of renting houses, he having agreed that the certificates of the tenants should be received as evidence of the amount of rents respectively paid by them, the tenants having proved the amount of the annual rent of the premises, we conclude that the master did right in assuming an intermediate point in the year for the computation of the annual amount of rent, in the absence of all proofs when its parts were paid; and that it was the fairest way of carrying out the substantial intention of the mandate of this court. But suppose, as was urged in argument, that the mandate had directed an annual application of the rent of the premises to the payment of the debt of the defendant, without specifying that the interest was to be calculated to a date contemporaneous with the last payment of the rent, and the debt was one carrying interest *de die in diem*. The mandate could only be executed according to the general rule in the case of such a debt by making every receipt for rent in discharge first of the interest, then of the principal. *Raphael v. Boehm*, 11 Ves., 92. The mandate is to be interpreted according to the subject-matter to which it has been applied, and not in a manner to cause injustice.

This is not like the case of a decree directing annual rents, with the view of compounding interest. The question now under consideration has been ruled as it is now decided, in *Bennington v. Harwood*, 1 Turn. & Russ., Ch. Rep., 477, a case upon a master's report of an account, under a decree that the master should set an annual value by way of rent upon the premises, the mortgagee being in possession: the master of the rolls decided that a mortgagee can never receive more than his principal and interest, and says: "Now if in the early part of the year a payment is made to him, exceeding the interest which is then due, and he is nevertheless allowed interest on the whole of his principal down to the end of the year, what is the profit which he derives from his mortgage, in the interval between the date of that payment and the date of the annual rent? It is clear that a part of his principal has been repaid to him, and yet he receives interest upon the whole of it; in other words, he gets more than five per cent. on the sum for which he is actually a creditor. Suppose that the sum paid

to Eadon on the 2d February had been equal to the whole of the £500, with the arrears of interest calculated to that day, would he have been entitled to interest up to the 5th of July? Is it possible that such should be the effect of a direction to make annual rents? The sums which a mortgagee in possession receives in respect of the mortgaged premises, at times intermediate between the dates of the annual rents, must be applied, when they exceed interest, to the reduction of the principal; and in the present case that course is clearly prescribed by the very words of the decree." Now, what was the decree in *Bennington v. Harwood*, 1 Turn. & Russ., 477? It was the usual decree against a mortgagee in possession, containing the common directions that the master should tax him the costs of suit, and so set an annual value by way of rent upon the premises, with further directions that the sums received in February, 1805, were to be applied forthwith, first to the discharge of the then existing arrear of interest, and next to the diminution of the principal. The master made the rest on the 5th July, instead of doing so in February; and the counsel contended in that case, as counsel have done in this, that a direction for annual rests excludes all rests which are not annual. But that position was not sustained by the master of the rolls, on general principles, though he concludes by saying in the present case, "that course is clearly prescribed by the words of the decree." The defendant here is substantially a mortgagee in possession, having a debt due to him, carrying interest *de die in diem*, and must abide the general rule for the application of payments to it.

This, then, is not a case in which the defendant has been deprived of a day's interest by the master's report, nor one in which the interest has been allowed upon rents and profits; but a case in which the application of a sum received by the creditor is made to prevent his whole debt from drawing interest after a part of it was probably paid. Of this there is a violent presumption. The general principal is, as it was ruled in *Breckenridge v. Brooks*, 2 A. K. Marsh, 341, that a mortgagee in possession is not to pay interest upon rents; but as the chief justice said in that case: "We will not say there may not be special circumstances which would justify allowing interest upon rents received by a mortgagee. We say in this, that whenever a mortgagee in possession, having a debt due to him, carrying interest *de die in diem*, shall collect an

amount of rent which will extinguish the interest and a part of the principal, that he is bound so to apply it." In *Fenwick v. Macey*, 1 Dana, 286, rents received by a mortgagee were directed to be applied as they accrued, to keep down the interest. In *Reed v. Lausdale*, Hard., 7, it was ruled that the equitable rule in redeeming, when the mortgagee is in possession, is to charge the profits of the mortgaged property against the principal and interest.

Having thus disposed of the exceptions to the report, and considered the principal argument of counsel against its confirmation, we remark that there is nothing on the face of the report adverse from the defendant's rights which should cause it to be set aside. Even with the computation of the rents as a credit on the 1st April, he is still a gainer; for the difference between the calculation so made, and what would have been the amount he would have received if the rents had been credited on the 1st November, is more than compensated by the use of large sums of money received by him as rent, after the total extinguishment of his debt. The complainant, however, took no exception to the report, and it must stand good against her.

We notice in conclusion an objection to the report urged in the defendant's petition for a re-hearing, and in the argument of the case. It is, that the decree of the court below is inconclusive as to whom the property is to be reconveyed. This is not an objection which the defendant can be permitted to urge. When he shall obey the decree in reconveying and surrendering the property, his responsibility will be at an end. As to the defendant, the decree of the court is conclusive against all persons who may legally claim from him any interest on the property as devisee or heir of Edward Livingston. As to those, the law of Louisiana fixes their respective rights, and upon those rights this court has not, nor does it intend to adjudicate in this cause. The general rule certainly is, that all persons materially interested in a suit ought to be parties to it, either as plaintiffs or defendants, that a complete decree may be made between those parties. *Caldwell v. Taggart*, 4 Pet., 190.

But there are exceptions to this rule, and one of these is, where a decree in relation to the subject-matter of litigation can be made without a person who has an interest having that interest in any way concluded by the decree. *Bailey v.*

Inglee, 2 Paige, 278. See, also, *Joy v. Wirtz*, 1 Wash., 577, where the rule is comprehensively expressed in respect to active and passive parties; and where a party is not amenable to the process of the court, or where no beneficial purpose is to be effected by making him a party, such interest must be a right in the subject of controversy, which may be affected by a decree in the suit. Such is the case as to Cora Barton in this cause. The subject-matter is to obtain from the defendant money decreed to be due to Edward Livingston, and the surrender and reconveyance of property forming a part of the real estate of Edward Livingston. After his death his widow, as executrix, was made a party to the bill; and the decree in that suit cannot in any way determine the rights of Cora Barton in her father's estate.

Besides, if there was any force in the objection it comes too late; for where a complainant omits to bring before the court persons who are necessarily parties, but the objection does not appear upon the face of the bill, the proper mode to take advantage of it is by plea or answer. If the objection appears on the face of the bill the defendant may demur. *Mitchell v. Lenox*, 2 Paige, 280. The objection of a misjoinder of complainants should be taken either by demurrers or in the answer of the defendants; it is too late to urge a formal objection of this kind for the first time at the hearing. *Trustees of Watertown v. Cowen*, 4 Paige, 510. So, also, it was ruled in 3 Paige, 222. We might crowd this opinion with decisions to the same point from the English and American chancery reports. But further the objection cannot prevail, for it does not show that the process of the court could reach Cora Barton. In *Mallow v. Hinde*, 12 Wheat., 193, it was ruled that wherever the case may be completely decided as between the litigant parties, an interest existing in some other person whom the process of the court cannot reach, as if such person be a resident of another state, will not prevent a decree upon the merits. And in the same case it was decided, where an equity cause may be finally decided as between the parties litigant without bringing others before the court, who would, generally speaking, be necessary parties, such parties may be dispensed with in the circuit court, if its process cannot reach them, as if they are citizens of another state. But when the rights of those not before the court are inseparably connected with the claim of the parties in the suit, the peculiar constitution of the circuit court

is no ground for dispensing with such parties. 12 Wheat., 194. In whatever point of view, therefore, the objection is considered, whether as to the interest of Cora Barton in the suit, the time when the objection has been made, or the manner in which it is made, in not showing that the process of the court could have reached her, is of no moment in this case.

This court, in regard to her, only directs her name to be inserted in the re-conveyance, it having been ascertained by the master that she is a forced heir of Edward Livingston, and that fact being admitted by the defendant, and the admission of its correctness being the foundation of his objection. The decree of the court below affirming the master's report, and directing a reconveyance of the property, is affirmed.

CHAPPEDELAINE v. DECHENEAUX.

(4 Cranch, 306-316. 1808.)

Error to U. S. Circuit Court, District of Georgia.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—The bill in this case is brought to set aside a stated account which was signed by Dumoussay and Chappedelaine in July, 1792, on the suggestion of fraud on the part of Dumoussay; or, if it be not set aside, to correct its errors, and to obtain a settlement of transactions subsequent to that account. The stated account is pleaded in bar of so much of the bill as requires that the subject should again be opened; and the particular errors assigned, with the exception of one in the addition, are denied in the answer.

That the plea in bar must be sustained, except so far as it may be in the power of the representatives of Chappedelaine to show clearly that errors have been committed, is a proposition about which no member of the court has doubted for an instant. No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony. But if palpable errors be shown, errors which cannot be misunderstood, the settlement must so far be considered as made upon absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such items cannot be supposed to have received his assent. The whole labor of proof lies upon the party objecting to the account, and errors which he does not plainly establish cannot be supposed to exist. Upon this

principle, the report of the auditors in this case, and the exceptions to that report, so far as respects the stated account, are to be considered. The first exception relates only to the manner in which the auditors understood the order referring the accounts to them, and need not be considered, since the sole inquiry will be, whether they have in fact made any deduction from the stated account which was not warranted by the interlocutory order, an order made on the principles which this court has already declared to be correct. The second exception refers to the particular deductions made by the auditors. The first is, that the item in the stated account of 604*l.* 6*s.* 5*d.* is reduced to 333*l.* 0*s.* 8*d.* The stated account between the parties, marked in the proceedings as the exhibit A, contains this item, and states it to be one-fifth of the expenses for disbursements on the island of Sapelo, which was the joint property of a company consisting of five, of which Dumoussay and Chappedelaine were partners. The items which composed this general account are all contained in exhibit F, stated by Dumoussay on the 3d of May, 1792, and assented to by Chappedelaine on the 23d of July, 1792, when the stated account was signed. The total of those disbursements is 4,224*l.* 3*s.* 8½*d.*, and the balance upon the account is 3,021*l.* 12*s.* 1½*d.*, the fifth of which is 604*l.* 6*s.* 5*d.*

In their explanatory report the auditors say that they took as the basis of this reduction an account settled by auditors in a suit decided in the circuit court of Georgia, which was instituted by Boisfeillet, one of the absent partners, against Dechenaux, who was executor both of Dumoussay and Chappedelaine. The auditors in that case were examined, and they depose that their corrections were made on the proof of double entries, false charges, omissions acknowledged by the executor of Dumoussay, and charges not proper to be made against Boisfeillet. This testimony would of itself be sufficient to convince the court that injustice was done in the settlement of July, 1792, but would not show explicitly the amount of that injustice, and enable them to say what deductions from that settlement ought to be allowed, because, as was well observed by the counsel for Dechenaux, items might be properly chargeable to Chappedelaine of which Boisfeillet ought not to bear a part. The court, therefore, sought, in the documents connected with the report, for that more explicit information. Upon looking into the exhibit F, there are, upon

the face of the paper, obvious errors, which demonstrate the incorrectness of that statement, and the excessive inattention of Chappedelaine. The first item on the debit side of this exhibit is the sum of 3,571*l.* 3*s.* 8½*d.* disbursed for Sapelo. The funds for this disbursement were in part in the hands of Dumoussay, as the remnant of advances previously made by the partners. To this remnant he states himself to have added 2,368*l.* 12*s.* 0½*d.* from his private funds. On this advance made by himself in Georgia, he charges the company fifteen per cent., amounting to 354*l.*, on account of the difference of exchange between money in France and in Georgia, or, as he expresses it, for exchange, freight and insurance. This charge has been rejected in the accounts of all the partners, for many obvious reasons. It is sufficient to observe that as this money was advanced in Georgia by Dumoussay, and repaid to him in Georgia by the partners, there was as much reason for making these charges on the repayment as on the original advance; and with respect to Chappedelaine, it is still more inadmissible, because he had previously advanced his portion of this money to Dumoussay, and had allowed him fifteen per cent. for these charges, in a deduction from that advance, so that this charge, with respect to Chappedelaine, is double.

The third item in this exhibit is a charge of 299*l.* as one year's interest on 2,368*l.* 12*s.* 0½*d.* This is more than double the real amount of interest. There is also in the credit side of the account an error of 100*l.* in the addition. The errors apparent on the face of the exhibit F amount to 611*l.*, and these errors are of such a description as strongly to characterize the stated account of July, 1792. In the account stated by the auditors, there are omissions of moneys received by Dumoussay, and admitted to be chargeable to him in this account with the company, amounting to 189*l.* 10*s.* 10*d.*

The account containing these incontestable errors was submitted to auditors and still further reduced by them. Several of the small errors which they have detected are perceived, but the whole cannot be traced by this court without engaging in the laborious task of auditors, which is incompatible with their duties. To that account the executor of Dumoussay, who was also the executor of Chappedelaine, was a party, and had a right, with respect to Boisfeillet, to rely upon the stated account of July, 1792, signed by Chappedelaine, because Chap-

pedelaine was the attorney in fact of Boisfeillet, and because Boisfeillet had sanctioned that settlement, and had assumed the payment of his part. Yet in that case the deductions from that account were made which the auditors in this case have taken as the basis of their settlement, and those deductions were made in consequence of double entries, false charges, and charges not admissible against Boisfeillet. The great difficulty in admitting such an account, under such circumstances, consists in the uncertainty of the amount of those charges which were rejected as being inapplicable to Boisfeillet. This difficulty is removed, in a great measure, by inspecting the report in the present case. In that report the auditors take up the items which were rejected on this principle, and charge them to Chappedelaine; so that, in truth, the alterations made in this item are all founded on errors which the auditors have corrected.

The second item of this exception is that the auditors reduced the sum of 336*l.* 16*s.* 8*d.*, admitted in the stated account as being one-fourth of the purchase and expense of Jekyll, to 311*l.* 9*s.* 6*d.*, making a difference of 25*l.* 7*s.* 2*d.* This item in the exhibit A, which is the stated account, is the result of exhibit G, which is the account of Jekyll, as settled between Dumoussay and Chappedelaine. There is an obvious error of 4*l.* 19*s.* 10*d.* in the division of 3*l.* 10*s.* in the hire of negroes, and the residue of the sum deducted is on account of the same charges on the moneys advanced for Jekyll, which were made on the moneys advanced for Sapelo, and which are rejected for the same reasons which were assigned for their rejection in that item of the account.

The auditors also reduced the sum of 990*l.* 3*s.* 1*d.*, assumed by Chappedelaine for Boisfeillet, to the sum of 410*l.*, making a difference of 580*l.* 3*s.* 1*d.* Nothing can be more obvious than the propriety of this reduction. Dumoussay charges Chappedelaine with the debt of Boisfeillet, amounting, as he says, to 990*l.* 3*s.* 1*d.*, which Chappedelaine assumes as the attorney of Boisfeillet. In a suit to which the executor of Dumoussay is a party, this debt appears to have been only 410*l.* No man can hesitate to admit that Chappedelaine must have credit with Dumoussay for the difference between the sum alleged to be due and the sum actually due from Boisfeillet. The auditors also struck out of the stated account the sum of 554*l.* 9*s.* 4*d.*, assumed by Chappedelaine for one of

the absent partners, that being considered by mistake as the share of that absent partner in the expenses of Sapelo. The sum actually due by that partner was afterwards paid by himself to the executor of Dumoussay. The court is satisfied, from the evidence, that this payment was made to Dechenaux as the executor of Dumoussay. The assumpsit of Chappedelaine was essentially as security for the absent partner, who still remained a debtor, and when the principal did himself pay what he owed to the original creditor, the assumpsit of Chappedelaine was of no further obligation. Although this was not an error in the account when settled, except so far as this charge exceeded the sum with which the absent partner was really chargeable, yet it becomes an item which can no longer be retained as a charge against Chappedelaine, and in reforming their accounts it must be excluded from them. There is also added to the credits of Chappedelaine the sum of 26*l.* 18*s.*, which the auditors state to be the difference between the amount of a receipt given by Dumoussay and the sum actually debited to him in the accounts between the parties. These several errors make up the sum of 1,457*l.* 8*s.* 4*d.*, from which is to be deducted the sum of 667*l.* 10*s.* 1*½d.*, admitted on the stated account to be due from Chappedelaine to Dumoussay. The balance standing to the credit of Chappedelaine would be, on the 30th of April, 1792, 789*l.* 18*s.* 2*¼d.*

The auditors state this balance at 1,346*l.* 10*s.* 7*d.*. But from this balance, reported by the auditors, is to be taken the sum of 305*l.* 13*s.*, allowed by Chappedelaine on the repayment in Georgia of money lent by him to Dumoussay in France. This sum has been disallowed by the auditors, but was allowed by the circuit court, and is allowed by this court. This would reduce the report of the auditors to 1,030*l.* 17*s.* 7*d.*, exceeding the balance which is here supposed by the sum of 240*l.* 19*s.* 4*¾d.* The greatest part of this excess is produced by one-third of merchandise sold and not entered in the account, and by a credit for continuing interest up to the 30th of April, 1792, on Chappedelaine's money in the hands of Dumoussay, which credits had been omitted in the stated account without any apparent reason, and must therefore have been among the numerous inaccuracies of that account. The residue of this excess is said by the auditors to be produced by numerous minute errors detected by a laborious investigation of all the accounts between the parties. This court cannot pursue them in that

investigation. But in a case so replete with errors, which mark excessive negligence on the one side, and which can scarcely be ascribed to mistake on the other, the court is of opinion that the report of the auditors stating that these corrections were made on the inspection of the vouchers and entries which were laid before them, ought to be received, unless the person taking the exception had himself required the testimony on any particular point to which he objected to be submitted to the court, or had required a special statement from the auditors, exhibiting the reasons for their opinion on the particular point.

The balance due to Chappedelaine on the 30th of April, 1792, is so much of the loan made by him to Dumoussay, in France, which remains unpaid. By the contract between the parties, that loan was to carry an interest of six per cent. per annum until paid. The court, therefore, cannot consider it as a claim on an unsettled account, or as carrying interest at the rate established in Georgia. It is still governed by the law of the contract, and must carry interest at the rate of six per cent. per annum. To the report, so far as it respects the accounts subsequent to the 30th of April, 1792, a general exception is taken, which is sufficiently repelled by the answer of the auditors. They say, if, in the opinion of the defendant below, the auditors admitted any charge against Dumoussay, which was not sufficiently supported by testimony, he ought to have obtained a special statement from the auditors, or have made a special exception which would bring the testimony on the particular point before the court. The only objection which the court can notice is the allegation in the exception that the auditors have proceeded on accounts rendered by Dechenaux, without allowing him a credit which he claimed in those accounts. That credit is the balance appearing to be due to Dumoussay by the stated account of July, 1792. But that balance was entirely changed. The item was fully disproved by the testimony laid before the auditors. Dechenaux did not then withdraw his account, and require the plaintiff below to support his claims by other vouchers. It was clearly in the power of the plaintiff to have done this, for he might have forced Dechenaux to produce the entries and vouchers from which he had made out the account exhibited by himself. By leaving this account with the auditors without objection, he acquiesced in their considering as correct the items it admitted.

This bill was brought to correct the stated account of July, 1792, and to settle the accounts between the parties subsequent to that period. The defendant exhibits the accounts subsequent to that period, but claims to set against them the balance due to his testator under the settlement of 1792. On those subsequent accounts that balance has no influence. By introducing it into an account he was compellable to render, he cannot destroy the effect of that account. Had he intended to rely on this circumstance, he ought to have made the point before the auditors, and thus have enabled the plaintiff to take other measures to substantiate his claim. The auditors say they "admitted the account presented by the defendant;" but this must be understood with the exception of the balance which he claimed under the settlement of July, 1792. It does not appear from their report that the claims of the plaintiff below rested on that account so far as it went; but it is probable that further research was deemed unnecessary. The court cannot say that in this the auditors erred.

The decree of the circuit court is affirmed, so far as it accords with this opinion, and is reversed as to the residue.

McMICKEN v. PERIN.

(18 Howard, 507-511. 1855.)

APPEAL from U. S. Circuit Court, Eastern District of Louisiana.

Opinion by MR. JUSTICE CAMPBELL.

The appellant further objects that his debt was not accurately ascertained by the master upon the decree of reference. In *Story v. Livingston*, 13 Pet., 359, this court decided that no objections to a master's report can be made which were not taken before the master; the object being to save time, and to give him an opportunity to correct his errors and reconsider his opinion. And, in *Heyn v. Heyn, Jacob*, 49, it was decided that, after a decree *pro confesso*, the defendant is not at liberty to go before the master without a special order, but the accounts are to be taken *ex parte*. This court will not review a master's report upon objections taken here for the first time. Our conclusion is, there is no error in the final decree rendered in the circuit court.

At a subsequent term, the appellant filed a petition in the circuit court, alleging that he had been deceived by the appellee in reference to the prosecution of the bill, and had

consequently failed to make any appearance or answer, and that he had a meritorious defense. He prayed the court to set aside the decree, and to allow him to file an answer to the bill. This petition was dismissed. We concur in the judgment of the circuit court as to the propriety of this course. This court, in *Brockett v. Brockett*, 2 How., 238, determined that an appeal would not lie from the refusal of a court to open a former decree, though the petition in that case was filed during the term at which the decree was entered. In *Cameron v. McRoberts*, 3 Wheat., 591, it decided that the circuit courts have no power to set aside their decrees in equity, on motion, after the term at which they were rendered. These decisions are conclusive of the questions raised upon the order dismissing the petition. The decrees of the circuit court are affirmed, with costs.

[NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

GAINES *v.* NEW ORLEANS.

(Circuit Court for Louisiana : 1 Woods, 104-112. 1871.)

Opinion by BRADLEY, J.

STATEMENT OF FACTS.—In these cases the defendants except to the master's report. It does not appear, by the report of the master's minutes, that the exceptions were taken before him.

The rule of practice is that no exceptions will be heard by the court which have not been made before the master, so as to give him an opportunity of considering the same and correcting his report. But as counsel on both sides have evidently acted under a misapprehension of the rule, I will not overrule the exceptions on that ground, especially as some of them are of great importance to the rights of the parties. But it is desirable that the rule should be observed, and hereafter, in the absence of very special circumstances, the court will feel bound to enforce it. It was declared by the supreme court of the United States in *McMicken v. Perin*, 18 How., 507, and in other cases there referred to.

The principal exceptions are: 1. That the defendants did not realize the rents and profits which the master has charged them with. As this is a matter of fact arising from the evidence, the court will not undertake to re-examine and re-try the whole case; but will allow the report to stand, unless

some particular matter is pointed out in which the master has committed an error, or unless it be shown that he has adopted some erroneous principle on which his account or calculation is based.

[NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

WOOD v. MANN.

(Circuit Court for Massachusetts: 2 Summer, 316-336. 1836.)

PETITION to take additional testimony after publication. The facts appear in the opinion.

Opinion by STORY, J.

Of the materiality of the testimony now proposed to be taken no doubt can be entertained. It goes to establish many of the leading points of fact in controversy between the parties; and if not vital in the cause, it is on all sides admitted to have a most stringent force and pressure. It is under circumstances so rare and so novel that this court is called upon to decide one of the most important and delicate questions of practice; than which, indeed, few, if any, can be presented better deserving of deliberate consideration and striking deeper into the foundations of equity jurisprudence. It is upon this account that I have taken time to examine the whole subject with all the aids which could be derived from the labors of counsel and my own auxiliary researches, feeling, as I do, an anxious desire to perform on the present occasion exactly what, upon the most careful survey of principles and authorities, it is my duty judicially to perform.

The general rule in equity proceedings is, that, after publication of the testimony, no new witnesses can be examined and no new evidence can be taken. This rule is at least as old as the time of Lord Bacon, among whose ordinances in chancery we find the following: "No witnesses shall be examined after publication, except by consent or by special order *ad informandum conscientiam judicis*; and then to be brought close sealed up to the court to peruse or publish as the court shall think good." The true exposition of the latter qualification of this rule would seem to be that the new evidence to inform the conscience of the judge should not be taken but upon or after the hearing, when the judge himself entertains a doubt, or when some additional fact or inquiry is indispensable to enable him to make a satisfactory decree.

So was the doctrine held in *Newland v. Honeman*, 2 Ch. Cas., 74; and it is strongly fortified by what fell from Lord Manners, in *Savage v. Carroll*, 2 Ball & Beatt., 444, and by the master of the rolls in *Parken v. Whitby*, 1 Turn. & Russ., 366. Except for such purposes and under some special order of the court itself at or after the hearing, no such testimony, taken after publication, is now deemed admissible, at least unless under extraordinary circumstances, under the rules. The practice of taking such testimony before the hearing, and keeping it sealed up to be used by the court at the hearing, if it should be deemed meet, is said by the text-writers to have fallen into disuse, and not to have been in practice for more than a century. *Hinde's Practice*, 316; *Beames' Orders in Chanc.*, 33, notes 117 and 118; *Dalby v. Mace*, *Tothill*, 191; *Carey's R.*, 83; *Wyatt, Pract. Register*, 354, 355; *Willan v. Willan*, 19 Ves., 592.

There is an old case reported in *Carey's Rep.*, 83, which shows what the old practice was; and I quote it in the very words of the report. "Upon affidavit made by the plaintiff, that since publication granted he had divers witnesses (setting down their names) come to his knowledge; therefore ordered he may examine them before the examiner *ad informandum conscientiam judicis*." No other circumstances are stated; and therefore it is impossible to know what the facts were, or whether the other testimony taken had been actually seen by the plaintiff.

The general rule is founded in the obvious public policy of suppressing perjury, and the fabrication of evidence, to meet the exigencies of the cause, after the full bearing and weight of the testimony are understood by all the parties. If, under such circumstances, the parties were permitted to supply the actual deficiencies of the evidence from time to time, as they should be found out, there would be strong temptations to corrupt and insidious practices to obtain new evidence; and there would be a premium held out for delays and omissions of diligence in taking the evidence, until the whole strength of the adversary's cause was disclosed. Courts of equity, from considerations of this sort, have always been disposed to uphold the rule with a firm and rigid exactness.

Lord Eldon, in *Whitelocke v. Baker*, 13 Ves., 511, said: "This court will not enlarge publication, without a very special case made. The party's want of knowledge of the

rules of proceeding, and want of attention in his solicitor, are not sufficient. The rules of justice are founded in great general principles, not to be broken down by such circumstances." Lord Macclesfield, in *Cann v. Cann*, 1 P. Will., 727, laid down the doctrine in more emphatic terms. "The precedent methods (said he) of this court were that, after publication is passed, and the purport of the examinations known to the parties, neither side is allowed, though they come recent, to enter into part examination of the matters in question, since otherwise there would be no end of things, and such a proceeding would tend to perjury, as well as vexation."

Exceptions, however, have been admitted to the general rule; and to these our attention will now be directed, in order to ascertain how far they are applicable to the circumstances of the case before the court. The exceptions will be found for the most part to turn upon grounds entirely consistent with the policy of the general rule, and in no manner trenching upon its justice or inconvenience. At the same time they exhibit in a marked manner the reluctance of the court to break in upon the general uniformity of the practice, except under very special circumstances.

It will not be necessary to go over the authorities at large; for they do not present any general diversity of judgment, requiring comment or criticism. They rather arrange themselves into classes, in each of which every successive judge has shown a solicitude to keep within the limits prescribed by his predecessors.

The first class of exceptions is that of the examination of witnesses to the mere credit of other witnesses whose depositions have been already taken in the cause. This is the ordinary practice, and is done upon articles or objections filed. Beames' Ord. in Ch., p. 32, § 72; *id.*, p. 187, § 80. But then, in these cases, the general interrogatory only, whether he (the proposed witness) would believe the other on his oath (which is the usual form of putting the interrogatory in England, and differs widely from that in which it is usually put in America—see 1 Starkie on Ev., 182, 2d ed., London, 1833; *Watmore v. Dickinson*, 2 Ves. & B., 267, 268; *Carlos v. Brook*, 10 Ves., 50), is that upon which the new examination is allowed, unless under very special circumstances. And there is this close limitation upon such special circumstances, that the interrogatory shall not be to any facts put in issue in the suit, but only to

such facts as merely touch the credit of the witness. This doctrine was expounded very fully by Lord Eldon in *Purcell v. McNamara*, 8 Ves., 324, 326, and *Wood v. Hammerton*, 9 Ves., 145; *Carlos v. Brook*, 10 Ves., 50, and *White v. Fussell*, 1 Ves. & Beam., 153; and it was recognized and acted upon by Mr. Chancellor Kent in *Troup v. Sherwood*, 3 John. Ch., 558, where he critically examined the leading authorities. But, what is most important in its bearing on the present case, is the absolute refusal of the court in these cases to allow the witness to be contradicted as to any fact which he had sworn, touching the merits of the matters in issue between the parties. "If (said Lord Eldon in *Purcell v. McNamara*), for instance, the fact is material to the merits of the case, and the witness has sworn to it, there is great danger of bringing other witnesses, under color of discrediting that witness, to prove or disprove such fact." See *Gilb. For. Rom.*, 147; *Smith v. Turner*, 3 P. Will., 413.

Another class of exceptions is where the application is made to enlarge the time for publication, or more frequently to enlarge the time for taking the testimony after publication has been, in form, though not in fact, made, according to the rules of the court. To such applications, whenever they will cause any delay in the cause, the court does not listen without some good cause shown upon affidavit; such as surprise, accident, or other circumstances which repel any imputation of laches. See *Gilb. For. Rom.*, 124; 1 Harris. Ch. Pr. by Newland, ch. 43, pp. 285, 287; see, also, *Watmore v. Dickinson*, 2 Ves. & B., 267, 268; *Cutler v. Cremer*, 6 Madd., 254. And in all cases of this sort before the application is allowed, the party and his clerk in court, and solicitor are required to make oath "that they have neither seen, heard, read, nor been informed of any of the contents of the deposition taken in that cause; nor will they see, hear, read or be informed of the same till publication is duly passed in the cause." *Gilb. For. Rom.*, 146; see, also, *Anon.*, 1 Vern., 253; *Hinde's Prae.*, 384, 385. And this affidavit is so important, that the court will never dispense with it except in a case of fraud practiced by the other party to evade the rule; as was the case in a memorable instance in Lord Somers' time, stated by Ch. Baron Gilbert (*Gilb. For. Rom.*, 146).

Lord Eldon, in commenting on the affidavit, and the strictness of the rule requiring it, said: "That it is founded upon

this: that no more dangerous mode of proceeding can take place than permitting parties to make out evidence by piecemeal, and to make up the deficiency of original depositions by other evidence." *Whitelocke v. Baker*, 13 Ves. R., 512. In the same case, where a motion was made, the effect of which was to introduce new evidence to be taken after the cause had been set down for a hearing, he added: "The next ground for this motion is the materiality of the farther evidence, which it is supposed can be given. If that could be represented as most highly material, I dare not trust myself with laying down a precedent that would authorize attempts to bring forward an application in every case, where, even after a cause had been set down, the party might see that it would not be convenient to hear the cause upon the evidence on which he originally intended to put it. The danger from that would be enormous." *Whitelocke v. Baker*, 13 Ves. R., 512. The only material abatement of the force of this language, as applied to the present case, is that it was spoken in a case not of newly discovered evidence, but of known evidence alleged to have been improperly and irregularly taken. Mr. Chancellor Kent, in *Hamersly v. Lambert*, 2 John. Ch. R., 432, reviewed the authorities, and sustained the doctrine, as above stated, with all the weight of his own great opinion.

Another class of exceptions is the proof of exhibits in the cause after publication, and even *via voce* at the hearing, where there has been an omission of the proof in due season, and they are applicable to the merits. Gilbert, in his *Forum Romanum*, page 183, takes notice of this practice, and says: "Upon this rehearing any exhibit may be proved *via voce*, as upon the original hearing. But no proof can be offered of any new matter without special leave of the court, which is seldom granted." The like doctrine is fully supported in many cases. See *Wight v. Pilling*, Prec. Ch., 496; *Dashwood v. Lord Bulkeley*, 10 Ves. R., 238; *Buckmaster v. Harrop*, 13 Ves., 458; *White v. Fussell*, 1 Ves. & B., 153; *Higgins v. Mills*, 5 Russ. R., 287; *Wyld v. Ward*, Younge & Jer., 384; *Williams v. Goodchild*, 2 Russ. R., 91; *Dale v. Rosebelt*, 6 John. Ch. R., 256.

Another class of exceptions is where depositions have been suppressed, from the interrogatories being leading, or for irregularity, or where it has been discovered that a proper release has not been given to make a witness competent; in

every such case, from the obvious necessity and in furtherance of justice, fresh interrogatories and a re-examination have been permitted. *Lord Arundel v. Pitt*, Amb. R., 585; *Perry v. Silvester*, 1 Jacob R., 83; *Curre v. Bowyer*, 3 Swanst. R., 357; *Sandford v. Paul*, 3 Bro. Ch. R., 370; S. C., 1 Ves. Jr., 398; 2 Dick. R., 750; *Spence v. Allen*, Prec. Ch., 493; *Shaw v. Lindsey*, 15 Ves. R., 380; *Cox v. Allingham*, 1 Jacob R., 337, 341, 343; *Callow v. Mince*, 2 Vern. R., 472. In the case of *Sandford v. Paul*, 2 Dick. R., 750; S. C., 3 Bro. Ch. R., 370; and 1 Ves. Jr. R., 398, it appears from Mr. Dickens' Reports that the subject was a good deal examined, and many authorities are cited by the reporter to show that the strictness of the rule had been relaxed in special cases of this nature.

All these classes of exceptions stand upon peculiar grounds and steer wide from any of the just objections which have been urged against the introduction of new evidence, after the pressure of the evidence, as taken, is fully known to both parties. The qualifications and limitations accompanying these exceptions demonstrate, in the most full and satisfactory manner, that the design of upholding the policy of the general rule constitutes the main ingredient in the view of the court in acceding to or refusing every application. If the existence of the evidence is fully known at the time of the taking of the depositions, and if it is not purely the case of written evidence, it will be difficult to find any uniform relaxation of the general rule, that, after publication passed, and the depositions have been seen, no new evidence shall be admitted.

The question, then, is reduced to this: whether new evidence by witnesses, which has been discovered since publication has passed, and the contents of the depositions been made known, can, consistently with the general objects and purposes of the rule, be allowed? Now, this is partly a matter of authority, and partly of principle. And I fully agree that if, upon a rehearing, or upon a bill of review, or upon a bill in the nature of a bill of review, the evidence of new witnesses ought to be let in, then it ought now to be allowed, to avoid circuitry of remedy and increased expenses in litigation. If, on the other hand, it would not, under such circumstances, be allowed; and if, in analogous cases, it has been rejected; and if no direct authority can be shown in favor of the motion, then, since it must be a case of not infrequent occurrence in practice, each of these considerations will furnish strong objections against the motion.

I have said that if, upon a rehearing or a bill of review, the plaintiff would be entitled to the benefit of this testimony, he ought now to be entitled to it; and, as it is applicable to points already in issue, there is no need of a supplementary bill. In this view of the subject I feel myself strongly fortified by the language of Lord Eldon in *Milner v. Lord Harewood*, 17 Ves. R., 148. "There is," said he, "no recollection of a supplemental bill of this kind; and if a new practice is to be settled, the strong inclination of my opinion is, that when the particular case arises, where either conversation or admission of the defendant becomes material after answer or replication; or, as in this instance, after examination of witnesses in the original cause; or if a new fact happens after publication, which it is material to have before the court in evidence, when the original cause is heard, it is much better, if the examination of witnesses, if required, should be obtained upon a special application for the opportunity of examining, and that the depositions may be read at the hearing; or if discovery is required, that the party should file a bill for that purpose merely; and if relief is required, that the answer comprehending the discovery should be read at the hearing of the original cause."

This language would certainly seem to show that there were cases in which new testimony might be taken after publication, at least as to facts and conversations occurring after the original cause is at issue, and publication passed. Here, however, the application is to admit newly discovered evidence of confessions before the bill was filed. In *Willan v. Willan*, 19 Ves. R., 591; *S. C. Cooper Eq. R.*, 291, the same great judge said: "It is perfectly established that after publication, previous to a decree, and the depositions have been seen, you cannot examine witnesses farther without leave of the court, which is not obtained without great difficulty; and the examination is generally confined to some particular facts. At the hearing of the cause the court sees all the evidence; and if, instead of deciding upon inference, it directs inquiries, the decree directing these inquiries is, in truth, the leave of the court given for farther examination of witnesses upon the very point." It is difficult to ascertain the precise limitations which ought to be applied to language so general; and whether the learned judge meant merely to advance the suggestion that the court might, to satisfy its own conscience, direct new evidence to be

taken at or after the hearing; or whether he meant to state, generally, that new testimony might be taken, upon a case made to the court, at any time after publication and before the hearing. Unfortunately, the case did not call for a more explicit declaration of opinion. But my impression is, that the former was all that was intended by the language.

In *Smith v. Turner*, 3 P. Will. R., 413, the cause was heard, and there appearing to the court some reason to suspect that the defendant had a deed in his custody, it was ordered that he should be examined on interrogatories touching the deed. Upon the examination he denied his having the deed and all the circumstances relating thereto. The master certified, notwithstanding that he thought it reasonable, that the plaintiff, who prayed a commission to examine witnesses to falsify the defendant's examination, should have one. But the court refused it, saying: "At this rate three or four causes might spring out of one, and though there could be no mischief in examining the party himself, yet the examining witnesses, after publication passed, especially where it may relate to the matter in issue, is against the rule of the court, and may be greatly inconvenient and make causes endless." This case certainly affords a strong illustration of the real purport of the general rule, and would make one hesitate in supposing that Lord Eldon meant, in the cases above stated, to maintain a broader doctrine.

In *Ward v. Eyles*, Moseley R., 377, the court would not allow a party in a cross-bill to examine witnesses, after publication passed and the depositions seen, to the matters in issue in the original cause. On that occasion, the lord chancellor said: "There is no rule in this court more sacred than that witnesses shall not be examined in another cause to matters in issue in a former." Yet, certainly, in a cross-bill, the party would be entitled to more favor than upon a mere application in the original cause.

In *The Mayor of London v. Dorset*, 1 Ch. Cas., 228, where a trial of an issue was directed at law, an application was made for a commission to examine a witness eighty years old who was not discovered until that time and was unable to travel. If she was able to travel she would be examinable at the trial, though publication had passed. The court granted the commission, apparently, as it would seem, upon the ground that otherwise the testimony would be lost; and yet the witness might, if living, be examinable at the trial at law.

In *Banks v. Farquharson*, Ambl. R., 145; S. C., 1 Dick. R., 67, where a hearing was adjourned over and it was moved for liberty to examine a witness to prove the handwriting of a witness to a deed, material in the cause, the motion was granted by Lord Hardwicke. So, in *Abrams v. Winshup*, 1 Russ. R., 526, where the evidence proved the execution of the will; but the witnesses had not been examined as to the sanity of the testator; the cause was adjourned at the hearing and liberty given to exhibit an interrogatory to prove his sanity. In each of these cases the object was special to establish the verity of a necessary document in the cause.

In *Blake v. Foster*, 2 Ball & Beatt. R., 457, an application was made upon the hearing for liberty to adduce newly-discovered evidence, partly oral and partly documentary. It was rejected, not upon any ground of the nature of the evidence, but because it was not in reality newly discovered. The case, therefore, decides nothing to our present purpose.

In *Clark v. Jennings*, 1 Anst. R., 173, 174, a motion was made after publication for leave to exhibit interrogatories to authenticate an old paper writing material in the cause, and for a commission to prove the same. The motion was opposed as being too late and that exhibits only can be proved after publication. The court of exchequer thought, that though not an exhibit, it was in the nature of one, and granted the rule, so as that it did not delay the hearing of the cause. It is proper to remark that the application was confined to a mere written document.

In *Williamson v. Hutton*, 9 Price R., 194, after a title cause had been set down for a re-hearing, a motion was made on behalf of the plaintiff for the examination of one or more witnesses, to prove certain accounts or rentals, and a terrier or memorandum, made by a former vicar, and to read the depositions at the re-hearing, upon the ground of their having been discovered since the original hearing and were before unknown to the plaintiff. The court granted the motion, and it was added, "If these papers had been found at the hearing we should have ordered the cause to stand over for the purpose of giving the plaintiff an opportunity of exhibiting an interrogatory." This, too, was the case of a written document.

In *Cox v. Allingham*, Jacob R., 337, permission was given at the hearing to exhibit an interrogatory as to the loss of a

deed, omitted by mistake to be proved in the proper manner. Sir Thomas Plumer, in delivering his opinion on this occasion, stated his strong impression of the dangers that would arise if in every instance a party, whose case broke down at the hearing, were at liberty to go into farther evidence. At the same time he admitted that it was too late to argue that there could be no case of exception to the general rule, after it had been departed from in some instances and by great authorities. He also took notice of the circumstance that the evidence proposed to be given related only to the proof of a document.

In *Ord v. Noel*, 6 Madd. R., 127, an application was made to file a supplemental bill, in the nature of a bill of review, on account of the discovery of some deeds and facts connected therewith since the decree. The vice-chancellor refused the petition; and the only remarks, material to our present purpose, which he made on that occasion, are: that if the plaintiff had applied, after he had discovered the contents of these deeds, and before the cause was finally heard, to have the benefit of this discovery at the hearing, the court would have found the means to render him that justice; and that the new matter for a bill of the nature proposed must be such as, if unanswered, would clearly entitle the plaintiff to a decree, or would raise a question of so much nicety and difficulty as to be a fit subject of judgment in a cause. *Brigham v. Dawson*, Jacob R., 243, was a similar application and shared a similar fate.

Coley v. Coley, 2 Younge & Jerv. R., 44, was an application, after publication passed, and the cause set down for a hearing, for liberty to examine two further witnesses, one only having been examined, to prove the execution of a will in the pleadings mentioned. The court granted it, saying that if, upon the hearing of the cause, the plaintiff had been unable to prove the execution of the will, the case would have been allowed to stand over for the purpose of supplying that proof, upon payment of the costs of the day.

Then came *Wyld v. Ward*, 2 Younge & Jer. R., 381, where, upon a re-hearing, a motion was made to exhibit an interrogatory to prove certain facts, upon the ground that they were newly discovered since the original hearing. Upon this occasion there was an elaborate argument by counsel. But the court granted the motion, saying that it had a discretion to

grant or refuse it, according to the circumstances of the particular case.

In *Williams v. Goodchild*, 2 Russ. R., 91, an application was made upon an appeal from a decree of the vice-chancellor to the lord chancellor, for permission to use, on the hearing of the appeal, some old documents and bailiffs' accounts, which had been discovered since the original hearing. On that occasion, Lord Eldon said: "I cannot lay it down that new evidence can in no case be received; nor will I decide that it is not to be introduced in this case, if the evidence here tendered shall be shown to be in its nature admissible, and a proper ground for its introduction shall be laid." This question was afterwards adjusted by an arrangement between the parties.

These are all the English authorities, bearing directly on the point now before the court, which the researches of counsel, as well as my own, have brought to my notice. What is very remarkable is, that not one of them presents the case of an application to introduce newly-discovered oral evidence, or newly-discovered witnesses; but they all relate to written documentary evidence. The courts upon deciding upon these applications, however, made no allusion to any distinction or practice excluding oral evidence; and the generality of the language sometimes used might incline one to believe that the evidence of new witnesses might, under some circumstances, be within the contemplation of the court.

Finding no direct English authority, either way, upon the point of the exclusion of oral evidence, unconnected with new written evidence, I have sought for information in cases of an analogous nature, such as bills of review, and supplementary bills in the nature of bills of review; for (I repeat it) if, in such cases, the evidence would be admissible, it ought now to be admitted. Unfortunately, there are not many cases of this sort to be found, and those which do exist do not afford any very satisfactory lights to settle the question now before the court. Indeed, bills of review are of very rare occurrence. Lord Chancellor Lyndhurst, in *Partridge v. Usborne*, 5 Russ. R., 249, 250, observed, that for the period of a century past very few instances had occurred of bills of review having been allowed to be filed. In that very case, he allowed matters, dependent upon oral as well as written evidence, which had been discovered since the decree, to be brought forward by a

supplemental bill in the nature of a bill of review. But then they related to facts not previously in issue in the cause. He thus settled a doubt, which had long existed on this very subject; and in respect to which, there was a *dictum* of Lord Eldon the other way, in *Young v. Keighly*, 15 Ves., 557.

Lord Chief Baron Gilbert (Gilb. For. Rom., 186), in laying down the rules as to granting bills of review, puts one of the requisites in these words: "Thirdly, they can examine to nothing that was in issue in the original cause, unless it be any matter happening subsequent, which was not before in issue, or upon matter of record, or *writing, not known before*. For, if the court should give them leave to enter into proofs upon the same points that were in issue, that would be under the same mischief as the examination of witnesses after publication, and an inlet into manifest perjury." Now, if this is to be deemed a true exposition of the doctrine in courts of equity, it makes an end of the present application. The difficulty is, whether the modern decisions affirm the practice in so limited a form.

Lord Hardwicke in *Norris v. Le Neve*, 3 Atk. R., 35, said that the rules of Lord Bacon upon bills of review had never been departed from. And, professing to give the substance of those rules, he added, "By the established practice of this court there are two sorts of bills of review: one founded on supposed error appearing in the decree itself; the other a new matter, which must arise after the decree; or upon new proof, which could not have been used at the time when the decree passed." The ordinance of Lord Bacon is substantially as here stated; his language on the last matter is: "Nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded." Beames' Ord. in Ch., p. 2, and note (3). See, also, *Patterson v. Slaughter*, Ambl. R., 293. In the case of *Norris v. Le Neve*, the application for the bill of review was not confined to "new proof" of a mere documentary character, but it embraced other facts of an oral nature; and Lord Hardwicke took no notice of any distinction between oral and written evidence. But he did take notice that the new discoveries amounted to no more than corroboratives only of the former points in issue. In another case, *Gould v. Tancered*, 3 Atk. R., 354, before the same great judge, no notice was taken of any positive distinction between oral and written evidence,

although certainly there may be good ground for such a distinction. In *Young v. Keighly*, 15 Ves., 557, which indeed was an application founded on the discovery of new documentary evidence, Lord Eldon said, "As far as I can ascertain, what the court permits with regard to bills of review upon facts newly discovered (he does not say documents), the decisions appear to have been upon new evidence, which, if produced in time, would have supported the original case." He added also in the same case: "The ground is even apparent on the face of the decree; a new evidence of a fact (not saying written evidence) materially pressing upon the decree, and discovered at least after publication in the cause." In *Partridge v. Osborne*, 5 Russ. R., 145, the new evidence (which went to points not before in issue), was certainly largely founded in mere oral proofs and testimony; yet it was admitted. The language of Lord Eldon in *Milner v. Lord Harwood*, 17 Ves. R., 148, already cited, appears to me to confirm the conclusion that, upon rehearings and bills of review upon newly-discovered evidence, parol evidence to facts is not necessarily prohibited by any general practice or rule of law.

I had occasion, in the case of *Dexter v. Arnold*, 5 Mason R., 303, 313, 314, to examine this subject with a good deal of care in reference to bills of review. I was not at that time, able to satisfy my mind that the doctrine, as to the admissibility of newly-discovered evidence, was limited to written evidence of a documentary nature. The subsequent authorities have not helped the matter in this particular. Upon principle it may, perhaps, be found difficult in all cases practically so to limit it; although no person is more sensible than myself of the great inconvenience and danger of admitting new evidence of a parol nature, after the former evidence in the cause has been seen; and, *a fortiori*, after the original cause has been heard. The reasons are well stated in *Jones v. Purefoy*, 1 Vern. R., 47; and still more forcibly in the case of *Respass v. M'Clanahan*, Hardin R., 346, 347, to which I shall presently advert. In examining the decisions of Mr. Chancellor Kent, in which he has collected the leading English decisions on this point, not only after publication, but upon bills of review, it will be seen that he has exhibited a strong disinclination to allow the introduction of any newly-discovered evidence, merely cumulative, or not of a documentary nature.

This is manifested in an especial manner in *Hamersley v. Lambert*, 2 Johns. Ch. R., 432, in *Livingston v. Hubbs*, 3 Johns. Ch. R., 124, and *Troup v. Sherwood*, 3 Johns. Ch. R., 558. Yet he is compelled to admit that there may be exceptions to the general rule. I cannot find, however, that he has ever made a direct decision that the newly-discovered evidence of witnesses to the facts in issue is not admissible on a hearing, or rehearing, or bill of review. He has, indeed, on one occasion, said that the nature of the newly-discovered evidence must be different from that of the mere accumulation of witnesses to a litigated fact. *Livingston v. Hubbs*, 3 Johns. Ch. R., 127. But his decision did not turn particularly upon that point. The language in *Taylor v. Sharp*, 3 P. Will., 371, upon which he has placed some reliance for this qualification of the doctrine, does not seem to me to have looked to any supposed difference in regard to the nature of the new matter, that is, whether newly-discovered testimony, or newly-discovered documents; but singly to the fact that it was newly-discovered matter of some sort.

I have thus gone over the principal cases (with an exception, which will presently appear) which seem to me to be applicable to the more general question before the court. The result has been already incidentally suggested. But I will give it in a more direct and positive form. It is, that there is no universal and absolute rule, which prohibits the court from allowing the introduction of newly-discovered evidence of witnesses to facts in issue in the cause, after publication and knowledge of the former testimony, and even after the hearing. But the allowance of it is not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause.

I am driven, therefore, and I regret it, by this view of the matter, to the consideration of the special circumstances of the present case, and to decide whether the court ought, upon general principles, and in the exercise of its just discretion, to grant the present petition. The objections which forcibly present themselves against it are (1) the great length of time since the publication of the evidence; (2) the nature of the evidence itself, being the asserted confessions of the defendant to many of the most material points in the case, a species of

evidence, of which it has been truly remarked, that it is the most easy to fabricate and the most difficult to refute; and (3) the fact that it is merely cumulative or corroborative testimony to the very points in issue. In my judgment, each of these objections has great intrinsic weight. The last has been thought by Mr. Chancellor Kent as of itself decisive. I find, too, that the same view of the matter has been taken by several other of the American courts, upon very solemn occasions. In *Respass v. McClanahan*, Hardin R., 342, it was held by the court of appeals of Kentucky, at that time adorned by minds of uncommon ability, that the discovery of new witnesses to prove a matter of fact in issue in the original cause is not a ground for a bill of review. The reasoning of the court is so very full and clear on the point, that I would gladly transfer it to this opinion, if it would not occupy too large a space. Upon that occasion the court said that, after the most careful search, they could not find one case reported in which a bill of review had been allowed on the discovery of new witnesses, to prove a fact which had before been in issue; although there were many, where bills of review have been sustained on the discovery of records and other writings relating to the title *generally* put in issue. The same doctrine has been since repeatedly affirmed by the same court; and particularly in *Bowles v. South*, Hardin R., 451, and *Head v. Head*, 3 Marsh. R., 121. It was also adopted and acted on by the court of appeals of Virginia in *Randolph's Ex'rs v. Randolph's Ex'rs*, 1 Hen. & Munf. R., 180.

I am not able to satisfy myself that this objection to the evidence is not well founded. On the contrary, the more I reflect, the more I feel the difficulty of the admissibility of merely cumulative and corroborative testimony, though newly discovered, to the facts in issue. If I were to decide in favor of its admissibility, I should, as far as I know, be the first judge who ever acted upon so broad a doctrine. I am not bold enough to adventure upon such a course. On the contrary, if I were called upon to frame a rule, it would be to exclude all testimony of newly-discovered witnesses to any facts in issue, unless connected with some newly-discovered documents. There is no authority in favor of the petition. There is authority against it. No book of practice states anything which leads to the conclusion that evidence, like that now proposed, has ever been admitted to the original hearing, or upon a re-

hearing, or upon any bill in the nature of a bill of review. So far as the books of practice speak, they lead in the opposite direction. My judgment, therefore, is, under all the circumstances, that the motion ought not to be granted.

CHAPTER IX.

AMENDMENTS—SUPPLEMENTAL AND REVIVAL BILLS.

Rule 28.

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filing blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

Rule 29.

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not

made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

Rule 30.

If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

Rule 57.

Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

Rule 60.

After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be re-sworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall

not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

Rule 56.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

Rule 58.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

PARKHURST v. KINSMAN.

(Circuit Court for New York : 2 Blatchford, 72-76. 1848.)

STATEMENT OF FACTS.—Application for leave to file a supplemental bill making Goddard a party and adding new charges against Kinsman, based partly on recent facts and partly on newly-discovered evidence. Notice having been

served on Kinsman and Goddard, both opposed the application on grounds that will appear sufficiently in the opinion of the court. The original bill was founded on an agreement between the plaintiff and Kinsman, which, upon certain conditions, gave to the latter the right to use the former's patent. There had been a provisional injunction, however, forbidding any further making or selling of the machines.

Opinion by BETTS, J.

It seemed to be supposed on the argument, by the counsel for the defendant, that the supreme court in requiring, by rule 57, notice to be given on an application for leave to file a supplemental bill, had put the petition upon the footing of the bill itself when filed, and that the application could be defeated by showing that the petition did not make a case establishing the propriety of the bill, and the legal liability of the party sought to be brought in, to the remedy sought by the suit. Such, however, is not the effect of the rule. It does not essentially change the practice as it before existed. In England and in this state supplemental bills were allowed to be filed only by leave of the court (Dan. Ch. Pr., 1655, Am. ed., and notes; *Eager v. Price*, 2 Paige, 333; *Lawrence v. Bolton*, 3 id., 294); and the court, in addition, frequently ordered notice to be given of the application. *Eager v. Price*, 2 Paige, 333. The design of notice is to avoid precipitation and a needless accumulation of pleadings. But the court inquires no further than to see whether probable cause exists for the new proceeding. The petition, accordingly, need not embrace the averments intended to be inserted in the supplemental bill, but need only advise the opposite party and the court of the ground on which the relief is applied for. The court may, therefore, deny leave to file a supplemental bill, and yet permit an amendment of the original bill; and this ability to shape and abridge the pleadings may be the reason of the practice which requires the assent of the court to the filing of a supplemental bill. In my opinion, then, all that the court looks to on motions of this description is to see that the plaintiff states facts or circumstances which, if properly pleaded, would sustain a supplemental bill.

The allegations in the petition in regard to Goddard would undoubtedly be insufficient as averments in a supplemental bill, but they embrace matters which, if well pleaded, may charge him as a party to the suit. The court will not decide

this motion on the technical rules applicable to a demurrer. The petition is sufficiently definite in charging that Goddard has become connected with the subject-matter of the suit against Kinsman since the original bill was filed, and is, in that connection, doing those acts in relation to the interests of the plaintiff which this court, by injunction, has restrained Kinsman from doing; and that is, in substance, sufficient, according to all the authorities, to authorize the plaintiff to bring Goddard before the court in the same suit to answer for his proceedings. On these points the plaintiff is entitled to a discovery from Goddard. It is a mistake to construe the petition as setting up, as the ground of complaint, an independent infringement by Goddard of the plaintiff's rights under his patent. Its bearing and manifest intent is to charge on Goddard a combination with Kinsman, and an acting in concert with him to defeat the right the plaintiff has to restrain Kinsman on the equities of the original bill. It is enough, on this motion, to allege such concert and combination on information and belief, whether such a charge would or would not be sufficient in the bill itself. The leave prayed for must, therefore, be granted in respect to Goddard.

Most of the matters sought to be inserted in the supplemental bill in respect to Kinsman would be proper subjects of amendment to the original bill, and could not lay the foundation for a supplemental bill. 1 Hoff. Ch. Pr., 393, 398; Story's Eq. Pl., § 333. But, as a discovery is sought from Kinsman in regard to particulars not stated in the original bill, and an answer to that has been already put in by him, the course of practice will justify the filing of a new bill. Mitf. Pl., 62, 3d Amer. ed., 99, and note.

The laches imputed to the plaintiff, in not pushing forward his suit since Kinsman's plea and answer were put in, might perhaps call for a fuller excuse, before the court would allow the plaintiff to change the issues by amending the original bill. Even then, however, the objection would not stand upon the ground of any essential injury to the defendant to arise from permitting such amendment, for it is not shown that any proofs have been taken by either party under the issues, or that the defendant has availed himself of his privilege under our practice of speeding the cause. But a supplemental bill may be filed at any stage of a cause, even after decree rendered (Story's Eq. Pl., § 338), and the nature of the present

litigation would induce the court to lend all reasonable aid to have every dispute between the parties in respect to their rights as involved in it definitively settled, and to leave nothing to be called up and pursued hereafter. Upon these considerations I shall authorize the supplemental bill to be filed as prayed for, with the insertion, as against Kinsman, of the allegations referred to in the petition, and which might not, if brought forward by themselves, justify more than an order for amendment.

LONGWORTH *v.* TAYLOR.

(Circuit Court for Ohio : 1 McLean, 395-410. 1838.)

Opinion of the Court.

From the supplementary bill lately filed it appears a part of the lot in controversy was sold by the complainant to Canby, and that he assigned his interest to Carneal; and this equity being still in Carneal, it is objected that he is not made a party to the suit. Is Carneal interested in this controversy? It is admitted that he might file his bill against Taylor, and set up his equity through his assignees; and if he may do this, is he not interested in the subject-matter of the bill? Is not the court called upon to act on an equitable title which includes the title of Carneal? And if he be not a party to the suit, will his rights be concluded by the decree?

It is true he may look to the complainant for a deed, but is he not the assignee of the plaintiff to the extent of the equity he claims? The supreme court has decided that an assignee in equity must make his assignees a party when he asks a specific execution of the contract; and this is required to be done that the court may see that the rights of the assignor are duly protected. But how much stronger is the reason to make the assignee of the equity a party on a bill filed by the assignor. The interests of the assignee are directly involved, and how can these be protected unless he be made a party to the suit?

Carneal may have some special ground of equity against Taylor which the plaintiff has not, and a decree in the case, as it now stands, would not prevent him from setting up this equity hereafter. And if the defendant may be again harassed with the assertion of a right which is necessarily involved in this suit, he may well object to the further progress of the suit until Carneal shall be made a party, if, under the

limited jurisdiction of this court, it can be done. He has a right to insist that the whole controversy shall be decided in the present suit.

It is a well settled principle that the assignee of an equity is a necessary party when such equity is set up in a court of chancery. Carnéal can be made a party as a co-plaintiff, so that no objection arises to this from the limited jurisdiction of this court. That some inconvenience may arise in making assignees parties, where they are very numerous, may be admitted; but the same inconvenience arises in many other cases, and for which the law has as yet provided no remedy, except in cases where a few persons may sue in behalf of themselves and others.

The question raised as to the ten per cent. on the purchase money due, under the new agreement, up to the time of the tender, is reserved until the next term, at which time, Carnéal having been made a party, the court will be prepared to enter a final decree.

[NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

PIERCE & McDONALD v. WEST'S EXECUTOR.

(3 Wash. C. C., 354. 1818.)

Upon a rule thus obtained by the defendant, to show cause why the amended bill in this case should not be referred to the master for impertinence, it appeared, that after all the original defendants, except two, had answered the bill, the plaintiffs obtained leave to amend, by making new parties, and calls upon all of the defendants to answer this bill.

WASHINGTON, JUSTICE. The rule is, that the amended bill should state no more of the original bill than may be necessary to introduce, and to make intelligible the new matter, which should alone constitute the chief subject of the bill. The reasons for this rule are obvious. Not only is the incorporating of the old bill into the amended bill unnecessary, but it increases the costs, and exposes the defendants, particularly those who have answered the original bill, to the trouble of searching out and separating the old from the new matter, at the peril of having their answer excepted to, if any mistake should happen, and all the matter of the amended bill should not be answered.

The amended bill calls upon the original defendants to

answer it, and upon the new defendants to answer both that and the original bill. Wherever leave to answer the bill is granted, it is more proper to file an amended bill, than to interline the original bill; particularly, if some of the defendants had before answered that bill.

The rule, therefore, must be made absolute. And on motion of the plaintiff's counsel leave was granted to file a new amended bill, comprising only the new matter, instead of referring the bill.

JACKSON *v.* ASHTON.

(10 Peters, 480, 481. 1836.)

APPEAL from U. S. Circuit Court, Eastern District of Pennsylvania.

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—A motion has been made to allow an amendment of the record of this case, by inserting an allegation of the citizenship of the parties, and to reinstate this cause on the docket under the following circumstances: The cause came before this court at the January Term, 1834; and, as will be found in the eighth volume of Mr. Peters' Reports, pp. 148, 149, was then reversed for want of jurisdiction of the circuit court by reason of the omission to allege that the parties were citizens of different states. The appeal to this court was dismissed, and the decree of this court was ordered to be certified to the circuit court.

We are of opinion that, under these circumstances, the record cannot be amended, or the cause reinstated in this court. It would, in effect, be a reversal of the former decree of this court. We have no power over the decrees rendered by this court after the term has passed, and the cause has been dismissed, or otherwise finally disposed of here.

But in our opinion there is no difficulty in making the proposed amendment in the circuit court, if that court shall see fit, in its discretion, to allow it to be done. The cause may then be reheard there, and upon the decree newly rendered an appeal can then be taken to this court, or a decree may be there rendered by consent of the parties, in order to enter the cause without any delay to this court. This court, in rendering its former decree, had no authority, not having any jurisdiction but to reverse for the want of jurisdiction of the circuit court, to send the cause back for further proceed-

ings, with liberty to amend the bill. But the mandate was not understood by us to apply, except to the record in its then state; and we entertain no doubt that, notwithstanding anything in the former decree of reversal, it is entirely competent for the circuit court, in their discretion, to allow the amendment now proposed to be made, and to reinstate the cause in that court. But we have no authority in the matter. The motion is, therefore, overruled.

CASTER *v.* WOOD.

(Circuit Court for Pennsylvania: 1 Baldwin, 289-291. 1831.)

STATEMENT OF FACTS.—This was an application to file an additional answer, upon affidavit that the respondent had since the former answer acquired further information.

Opinion of the COURT.

Applications to amend an answer are not grantable of course, but depend on the discretion of the court; they are viewed more favorably when made to reform an answer than when made to take it off the file and substitute a different one; the former is allowed in many cases, the latter only in special cases, where the conscience of the court is satisfied that the purposes of justice require it. 4 Madd., 28; 4 J. C., 375, 376.

As a general rule, the plaintiff is entitled to the benefit of all the admissions of the defendant on oath, and it must be a clear case where the answer will be permitted to be taken from the file. But the present motion is merely to amend and explain matter not fully stated in the answer, on account of the partial information then possessed by the defendant, and the introduction of new matter since come to his knowledge, deemed material to the case. We think it comes within the established rules of courts of equity, and therefore allow the amendments, imposing on the defendant the condition of furnishing the opposite party with the names of the witnesses whose depositions he intends to take.

FITZPATRICK AND OTHERS *v.* DOMINGO.

(14 Fed. Rep. 216. 1882.)

BILLINGS, D. J. This cause is submitted on a demurrer to a bill of revivor. The original bill was to obtain an accounting from the respondent, Jose Domingo, in behalf of the next of kin of his deceased wife as to her estate. The bill of revivor

sets out the original bill, the pendency and progress of the suit, the death of the original respondent, the probate of his last will, the appointment and qualification of the executor, and then prays for the revival of the suit against the estate of Domingo by bringing in the executor.

It is not questioned that the cause of the action originally commenced against Domingo survives against his estate; but the point urged is that under the laws of Louisiana, in the courts of the state of Louisiana, all claims against the estates of decedents must be presented in the mortuary court. But the question is here one of federal jurisdiction, to be determined by the statutes of the United States, and the provisions "of these statutes are," as Judge Conkling, in his treatise, page 469, remarks, "very ample."

The Judiciary Act (1 St. at Large, p. 90, Sec. 31,) provides that in case the cause of action survives, and either party dies, the court before whom such cases may be depending is empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require, and that such executor or administrator may be brought in by process, and the court may render judgment in the same manner as if he had appeared voluntarily.

In *Clarke v. Mathewson*, 12 Peters, 164, a bill had been filed by Wetmore, who subsequently died. Clarke was appointed administrator, and filed a bill of revivor. Both the administrator and the respondent were citizens of Rhode Island.

The court held that both upon the settled rules of equity jurisprudence, and under the statute above referred to, "the revivor of a suit in equity by or against the representative of a deceased party was a matter of right and a mere continuation of the original suit." Rule 56 in equity is declarative, not only of the practice of the court, but of the provisions of the statute. The statute of Louisiana, in this respect, operates only upon her own courts, and cannot deprive this court of a jurisdiction already vested and expressly continued by an act of congress. The demurrer is therefore overruled, with leave to answer by the next rule day.

GIANT POWDER COMPANY *v.* CALIFORNIA VIGORIT POWDER COMPANY.

(Circuit Court for California; 5 Federal Reporter, 197-203. 1880.)

Opinion by FIELD, J.

STATEMENT OF FACTS.—This case was heard by me whilst holding the circuit court in San Francisco, in the month of September last, and was decided on the 12th of October following. The decision was against the complainant, and a decree was entered, dismissing the bill. The complainant's counsel now present to me at Washington a petition for a rehearing.

The case was elaborately argued at the circuit, counsel occupying several days in the presentation of their views. Their arguments were taken down by a short-hand writer, and printed, thus enabling me to read what I had patiently listened to in the oral discussion.

The question before the court was the validity of the re-issued patent to the complainant. The main objection urged to its validity was that it was for a different invention from that described in the original patent. And upon that point the argument was full, elaborate and able. It is difficult to see how the position of the complainant in support of the patent could have been more cogently presented.

The original patent was for a compound of nitro-glycerine with an inexplusive porous absorbent, which would take up the nitro-glycerine, and render it safe for transportation, storage and use without loss of its explosive power. The re-issued patent is for a compound of nitro-glycerine with any porous absorbent, explosive or inexplusive, which will be equally safe for transportation, storage and use without loss of explosive power. In other words, the re-issued patent drops the limitation of the original, and seeks to cover all compounds in which nitro-glycerine is used in connection with a porous absorbent, in the production of blasting powder, thus practically securing to the patentee a monopoly of nitro-glycerine in the manufacture of that powder. The court held that the re-issued patent was, therefore, more extensive in its scope than the original patent, and on that ground was invalid. It covered a different invention.

The court also held that the original patent was neither invalid nor inoperative from any defective specification, but was valid and operative for the invention described: and that this

appeared upon a comparison of the two patents, the re-issued patent differing from the original only in the extent of its claim: and that, therefore, the commissioner exceeded his jurisdiction in granting a re-issue at all, as well as on the ground that the re-issued patent was for a different invention. This latter position was not, it is true, discussed in the oral argument, but it is raised by the pleadings, and the attention of complainant's counsel at San Francisco was called to it, and a note of authorities on the point was received from him, embracing the greater part of those mentioned in the petition for rehearing. Whether the position be well taken or not cannot affect the decision of the case, if the re-issued patent cover a different invention from that described in the original patent.

But the petition cannot now be considered by me at Washington. It is not an *ex parte* proceeding; it can only be presented on notice, and can only be considered after the other side has had an opportunity to answer it. The *ex parte* presentation by counsel has evidently been made from a failure to distinguish between an application for rehearing after the decision of an appellate tribunal, and an application for a rehearing in a court of original jurisdiction after entry of a final decree. The distinction between applications for rehearing in the two cases is pointed out by Chief Justice Taney in *Brown v. Aspden*, 14 How., 26: "By the established rules of chancery practice," said the chief justice, "a rehearing, in the same sense in which that term is used in proceedings in equity, cannot be allowed after the decree is enrolled. If the party desires it, it must be applied for before the enrollment. But no appeal will lie to the proper appellate tribunal until after it is enrolled, either actually or by construction of law; and, consequently, the time for a rehearing must have gone by before an appeal could be taken. In the house of lords in England, to which the appeal lies from the court of chancery, a rehearing is altogether unknown. A re-argument, indeed, may be ordered if the house desires it for its own satisfaction. But the chancery rules in relation to rehearings, in the technical sense of the word, are altogether inapplicable to the proceedings on the appeal.

"Undoubtedly this court may and would call for a re-argument where doubts are entertained which it is supposed may be removed by further discussion at the bar. And this may be done after judgment is entered, provided the order for re-

argument is entered at the same term. But the rule of the court is this: that no re-argument will be heard in any case after judgment is entered, unless some member of the court who concurred in the judgment afterwards doubts the correctness of his opinion and desires a further argument on the subject. And when that happens, the court will, of its own accord, apprise the counsel of its wishes and designate the points on which it desires to hear them.

"According to the practice in the supreme court, if the court does not, of its own motion, desire a rehearing of a case decided, counsel are at liberty to submit without argument a brief petition or suggestion of the points upon which a rehearing is desired. If, then, any judge who concurred in the decision thinks proper to move for a rehearing, the motion is considered by the court; otherwise the petition is denied of course." *Public Schools v. Wallace*, 9 Wall., 604.

A similar course of procedure would be appropriate in any appellate tribunal. To allow an argument upon such a petition would lead in a majority of cases to a mere repetition, with more or less fullness, of the points presented on the original hearing, and cause infinite delays to the prejudice of other suitors before the court.

There is another observation to be made upon rehearings in equity after a final decree in courts of original jurisdiction. The practice in this country and that which formerly prevailed in England are essentially different. According to the practice in the English courts, a rehearing previous to the enrollment of the decree, when the petition was approved by the certificate of two counsel, was granted almost as a matter of course. Repeated rehearings in the same cause were not uncommon, and the consequent delays and expense from this practice were so great as to lead to the interposition of parliament for its correction. The subject is mentioned by Chief Justice Taney in his opinion in the case of *Howard*. There, when a case was decided, memoranda for the decree were entered in the minutes of the court; in some instances the final decree was thus entered; but the decree was not considered as strictly a record until it was engrossed, signed and entered at length in the rolls of the court. Between the time of the decision and the entry of the memoranda of the decree, and the time the decree took a definitive shape by enrollment, it was open to modification and correction, and even to entire

change. But when once enrolled the decree was not subject to change except in the house of lords, or by a bill of review. 2 Daniell's Chancery Practice, 1018.

In this country there is not, except, perhaps, in one or two states where the old forms of equity practice are retained, any such proceeding as the formal enrollment of decrees. Here, when a case in equity is decided, a decree is drawn up and signed by the judge, and entered on the records of the court, with about the same formality as a judgment in a case at law. And rehearings are then granted, except when the judge acts of his own motion, only upon such grounds as would authorize a new trial in an action in law; that is, for newly-discovered evidence or errors of law apparent upon the record. All the limitations which control courts in actions at law, in considering allegations of newly-discovered evidence and of errors at law, apply to applications for rehearing in such cases. Bentley v. Phelps, 3 Woodb. & M., 403. See, also, Dogget v. Emerson, 1 Woodb. & M., 1; Emerson v. Daniels, id., 21; Tufts v. Tufts, 3 Woodb. & M., 426; and also Clapp v. Thaxter, 7 Gray, 386.

The course of procedure for the complainant, therefore, is to file its petition with the clerk of the circuit court at San Francisco, and obtain from the court or circuit judge an order upon the defendants to show cause on the following rule day, or some other day mentioned, why its prayer should not be granted. The defendants can then answer the petition, and upon the petition and answer the application can be heard. A rehearing should not be granted for newly-discovered evidence where the evidence could have been obtained by reasonable diligence on the first hearing, nor when it is merely cumulative to that previously received, nor when, if presented, it would not have changed the result. And as to errors of law, they should be such as are clearly shown by considerations not previously presented. A new hearing should not be had simply to allow a rehash of old arguments. The proper remedy for errors of the court on points argued in the first hearing is to be sought by appeal, when the decree is one which can be reviewed by an appellate tribunal. See Tufts v. Tufts, *supra*.

The petition, therefore, cannot be heard by me *ex parte* at Washington. The complainant must pursue the regular course of procedure, and give notice to the opposite party. If

the petition be filed during the term, the court will retain jurisdiction over the case, and may subsequently decide upon the application. The eighty-eighth rule in equity applies only where no petition is presented during the term.

As the circuit court in San Francisco will be held by the circuit judge in my absence, he will direct its clerk to forward the petition and answer to me at Washington, accompanied with such briefs as counsel may file within a reasonable time to be allowed by the court. The application will then be taken up and disposed of, and my judgment sent to the circuit court and there entered. Where cases have been heard by the circuit judge sitting alone, I do not myself hear applications in them for a rehearing, or motions for a new trial, except by his request. This consideration to the different judges composing the court is essential to the harmonious administration of justice therein. As observed by me in a case reported in 1 Sawyer: "The circuit judge possesses equal authority with myself on the circuit, and it would lead to unseemly conflicts if the rulings of one judge, upon a question of law, should be disregarded or be open to review by the other judge in the same case."

The petition contains what purports to be a copy of my opinion, but it is a copy of the opinion before it was revised. The opinion should not have been published until it had received my revision, as counsel very well know. In any petition hereafter filed it is expected that a correct copy will appear, if any one is given. If the present petition is used the opinion must be corrected in accordance with the revised copy.

Before concluding it may not be amiss to invite the attention of complainant's counsel to the language of Judge Story, in the case of *Jenkins v. Eldredge*, with respect to the earnestness with which counsel, in applying for rehearings, sometimes asseverate their convictions of the errors of the court; and to repeat what is there said, "that if any judge should be so unstable in his views or so feeble in his judgment as to yield to them, he would not only surrender his independence but betray his duty. However humble may be his own talents, he is compelled to treat every opinion of counsel, however exalted, which is not founded in the law and the facts of the case, to be voiceless and valueless." 3 Story, 303. Nothing can be gained by strong language expressed by counsel in

presenting the petition as to the supposed errors of the court, nor by the statement as to what may have been said of the decision by other counsel, who have neither examined, studied nor understood the case.

CHAPTER X.

PREPARATION FOR HEARING—SUBMISSION OF CAUSE—DECREE.

Rule 86.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:" [Here insert the decree or order.]

Rule 92.

Ordered, That in suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

Rule 73.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

Rule 85.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

FORGAY v. CONRAD.

(6 Howard, 201-206. 1847.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—A motion has been made to dismiss this appeal on the ground that the decree in the circuit court is not a final decree within the meaning of the acts of congress of 1789 and 1803.

The bill was filed by the appellee, as the assignee in bankruptcy of a certain Thomas Banks, in the circuit court of the United States for the district of Louisiana, against the appellants, and Banks, the bankrupt, and three other defendants. The object of the bill was to set aside sundry deeds made by Banks for lands and slaves, which the complainant charged to be fraudulent, and for an account of the rents and profits of the property so conveyed; and also for an account of sundry sums of money which he alleged had been received by one or more of the defendants, as specifically charged in the bill, which belonged to the bankrupt's estate at the time of his bankruptcy. The case was proceeded in until it came on for hearing, when the court passed a decree declaring sundry deeds therein mentioned to be fraudulent and void, and directing the lands and slaves therein mentioned to be delivered up to the complainant, and also directing one of the defendants named in the decree to pay him \$11,000, received from the bankrupt in fraud of his creditors, and "that the complainant do have execution for the several matters aforesaid in conformity with law and the practice prescribed by the rules of the supreme court of the United States." The decree then directs that the master take an account of the profits of the lands and slaves ordered to be delivered up, from the time of the filing the bill until the property was delivered, or to the date of the master's report, and also an account of the money and notes received by one of the defendants (who

has not appealed) in fraud of the creditors of the bankrupt, and concludes in the following words: "And so much of the said bill as contains or relates to matters hereby referred to the master for a report is retained for further decree in the premises; and so much of the said bill as is not now nor has been heretofore adjudged and decreed upon, and which is not above retained for the purposes aforesaid, be dismissed without prejudice, and that the said defendants do pay the costs." Among the deeds set aside as fraudulent is one from the bankrupt to Ann Fogarty, otherwise called Ann Wells, for two lots in the city of New Orleans, and sundry slaves, which she afterwards conveyed to Forgay, the other appellant. Both of these deeds are declared null and void, and the lots, with the improvements thereon, and the negroes, directed to be delivered to the complainant for the benefit of the bankrupt's creditors. This part of the decree is one of the matters of which the complainant was to have execution. But the account of the rents and profits of this property is, like other similar accounts, referred to the master and reserved for further decree.

The appeal is taken by Samuel L. Forgay and Ann Fogarty, otherwise called Ann Wells; and they alone are interested in that portion of the decree last above mentioned. The bankrupt and the three other defendants have not appealed. These three defendants claimed other property, which had been conveyed to them at different times, and by separate conveyances, as mentioned in the proceedings. And it was not, therefore, necessary, that they should join in this appeal. *Todd v. Daniel*, 16 Pet., 523.

The question upon the motion to dismiss is whether this is a final decree within the meaning of the acts of congress. Undoubtedly it is not final in the strict, technical sense of that term. But this court has not heretofore understood the words "final decree" in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature. In the case of *Whiting v. The Bank of the United States*, 13 Pet., 15, it was held that a decree of foreclosure and sale of mortgaged premises was a final decree, and the defendant entitled to his appeal without waiting for the return and confirmation of the sale by a decretal order. And this decision is placed by the court upon the ground that

the decree of foreclosure and sale was final upon the merits, and the ulterior proceedings but a mode of executing the original decree. The same rule of construction was acted on in the case of *Michoud and others v. Girod and others*, 4 How., 503. The case before us is a stronger one for an appeal than the case last mentioned. For here the decree not only decides the title to the property in dispute, and annuls the deeds under which the defendants claim, but also directs the property in dispute to be delivered to the complainant and awards execution. And according to the last paragraph in the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the master. In all other respects, the whole of the matters brought into controversy by the bill are finally disposed of as to all of the defendants, and the bill as to them is no longer pending before the court, and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for a rehearing, within the time prescribed by the rules of this court regulating proceedings in equity in the circuit courts. If these appellants, therefore, must wait until the accounts are reported by the master and confirmed by the court, they will be subjected to irreparable injury. For the lands and slaves which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt, before they can have an opportunity of being heard in this court in defense of their rights. We think, upon sound principles of construction, as well as upon the authority of the cases referred to, that such is not the meaning of the acts of congress. And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the circuit court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.

This rule, of course, does not extend to cases where money is directed to be paid into court, or property to be delivered to a receiver, or property held in trust to be delivered to a new

trustee appointed by the court, or to cases of a like description. Orders of that kind are frequently and necessarily made in the progress of a cause. But they are interlocutory only, and intended to preserve the subject matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be adjudicated by a final decree. The case before us, however, comes within the rule above stated, and the motion to dismiss is therefore overruled. We, however, feel it our duty to say that we cannot approve of the manner in which this case has been disposed of by the decree. In limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the house of lords may be taken from an interlocutory order of the chancellor, which decides a right of property in dispute; and therefore there is no irreparable injury to the party by ordering his deed to be canceled, or the property he holds to be delivered up, because he may immediately appeal; and the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. And if, by an interlocutory order or decree, he is required to deliver up property which he claims, or to pay money which he denies to be due, and the order immediately carried into execution by the circuit court, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right. It is exceedingly important, therefore, that the circuit courts of the United States, in framing their interlocutory orders, and in carrying them into execution, should keep in view the difference between the right of appeal as practiced in the English chancery jurisdiction, and as restricted by the act of congress, and abstain from changing unnecessarily the possession of property or compelling the payment of money by an interlocutory order.

Cases, no doubt, sometimes arise where the purposes of justice require that the property in controversy should be placed in the hands of a receiver, or a trustee be changed, or money be paid into court. But orders of this description stand upon

very different principles from the interlocutory orders of which we are speaking. In the case before us, for example, it would certainly have been proper, and entirely consistent with chancery practice, for the circuit court to have announced, in an interlocutory order or decree, the opinion it had formed as to the rights of the parties, and the decree it would finally pronounce upon the titles and conveyances in contest. But there could be no necessity for passing immediately a final decree, annulling the conveyances, and ordering the property to be delivered to the assignee of the bankrupt. The decree upon these matters might and ought to have awaited the master's report; and when the accounts were before the court, then every matter in dispute might have been adjudicated in one final decree; and if either party thought himself aggrieved, the whole matter would be brought here, and decided in one appeal, and the object and policy of the acts of congress upon this subject carried into effect. These remarks are not made for the purpose of censuring the learned judge by whom this decree was pronounced, but in order to call the attention of the circuit courts to an inconvenient practice into which some of them have sometimes fallen, and which is regarded by this court as altogether inconsistent with the object and policy of the acts of congress in relation to appeals, and at the same time needlessly burdensome and expensive to the parties concerned, and calculated, by successive appeals, to produce great and unreasonable delays in suits in chancery. For it may well happen that, when the accounts are taken and reported by the master, this case may again come here upon exceptions to his report, allowed or disallowed by the circuit court, and thus two appeals made necessary, when the matters in dispute could more conveniently and speedily, and with less expense, have been decided in one.

RAILROAD COMPANY *v.* SWASEY.

(23 Wallace, 405-411. 1874.)

APPEAL from U. S. Circuit Court, Eastern District of North Carolina.

STATEMENT OF FACTS.—The decree in this case was to the effect that certain shares of stock in the North Carolina Railroad Company belonging to the state of North Carolina, were pledged as security for certain certificates of debt, and that the

plaintiff and those he represented were entitled to have the stock sold to pay past-due coupons. It also ordered that the commissioner take an account as to interest due and to become due, the proportion of stock applied to the payment of interest, and that unless the state shall have made provision for the payment of such interest by a certain day, the stock be sold.

Opinion by WAITE, C. J.

An appeal may be taken from a decree of foreclosure and sale when the rights of the parties have all been settled and nothing remains to be done by the court but to make the sale and pay out the proceeds. This has long been settled. *Ray v. Law*, 3 Cranch, 179; *Whiting v. Bank of the United States*, 13 Pet., 15. The sale in such a case is the execution of the decree. By means of it the rights of the parties are settled and enforced. But to justify such a sale without consent, the amount due upon the debt must be determined and the property to be sold ascertained and defined. Until this is done the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged. So, too, process for the sale of specific property cannot issue until the property to be sold has been judicially identified. Such adjudications require the action of the court. A reference to a master to ascertain and report the facts is not sufficient. A master's report settles no rights. Its office is to present the case to the court in such a manner that intelligent action may be there had, and it is this action by the court, not the report, that finally determines the rights of the parties.

With these well-settled principles as our guide, it is easy to see that the decree here appealed from is not final. The amount of the debt which the state must pay in order to stop the sale has not been determined, neither has it been determined what amount of stock may be sold if the debt is not paid. In each of these questions the state has a direct interest, and through its representatives in court has the right to be heard. They must be settled before the litigation can be said to be at an end. The amount of the debt and the proportion of stock applicable to its payment are, therefore, still open for future adjudication between the parties. Thus far the court has done no more than declare that for the security of the payment of so much as is due, the plaintiff and those

he represents have a lien upon their equitable proportion of the stock, and that the lien may be enforced by sale, if payment of the debt is not made. It has also declared its determination to order a sale, if payment of the debt is not made or satisfactorily provided for by April 1, 1875. In order that proper action may be had when this time arrives, the master has been directed to state the account of the indebtedness to the plaintiff and those he represents, and of their proportion of securities pledged by the state. In this, as it seems to us, the court has acted upon the suggestion in *Forgay v. Conrad*, and by an interlocutory order announced the opinion it had formed as to the rights of the parties and the principles of the decree it would finally render, leaving the entry of the final decree in form to be made when the amount due has been ascertained and an apportionment of the stock made. In this way the rights of all parties can be protected and no injustice done.

In this connection it may not be improper to call the attention of the circuit courts to what was said by Chief Justice Taney in *Forgay v. Conrad*, as to the care which ought to be exercised in the preparation of decrees of this character. Much time of this court and expense of litigants will be saved if more attention is given to the form of decrees when entered.

CHAPTER XI.

PRELIMINARY INJUNCTIONS AND RESTRAINING ORDERS.

Rule 55.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

EWING *v.* BLIGHT.

(Circuit Court for Pennsylvania : 3 Wallace, Jr., 139, 140. 1885.)

STATEMENT OF FACTS.—During the pendency of a plea to the jurisdiction an application was made for an injunction and a receiver.

Opinion by GRIER, J.

The pendency of a plea to the jurisdiction of the court necessarily precludes all further action of the court till it is decided. This rule of practice is founded on reason as well as fortified by authority. 13 Ves., 164.

While the jurisdiction of the court or the equity of the bill is in doubt by the pendency of a plea or demurrer, it would be highly improper for the court to interfere by the exercise of such high powers over men's property.

The court have it always in their power to guard against the abuse of dilatory pleas. If irremediable mischief should impend, which it is absolutely necessary to meet with promptness, or if there be any just suspicion that the plea or demurrer is merely intended for delay, the court will order an immediate hearing or trial of the plea.

If an issue be desired to try the plea of jurisdiction in this case it will be ordered, or any other rule which complainant may desire, for the purpose of expediting the final hearing in case the jurisdiction should be found to exist.

McCAULEY *v.* KELLOGG.

(Circuit Court for Louisiana : 2 Woods, 13-23. 1873.)

STATEMENT OF FACTS.—Bill in equity heard on motion for preliminary injunction.

The bill states that the complainant is the holder of a number of bonds of the state of Louisiana. The prayer of the bill is that the defendants, who are the governor and other state officers, be restrained from obeying the so-called funding bill, an act passed and approved January 24, 1874, the effect of which, it is alleged, would be to repudiate the contracts made by the state with complainant and other creditors, and that they be decreed to specifically perform the contracts made by the state with the complainant. Further facts appear in the opinion of the court.

Opinion by Woods, J.

It is obvious to remark that there are insuperable objections to so much of the prayer for relief as asks that the defendants may be decreed to comply with and specifically perform the contracts of the state by estimating and collecting the interest and sinking fund tax, and applying it to the payment of the principal and interest of the bonds. The objection is that if there is a remedy at all it is a remedy at law, namely, by the issuance of the writ of *mandamus*. If this suit were brought against a municipal corporation and its officers to compel the collection of a tax to pay the interest on its bonds, the plain, adequate and complete remedy would be the legal writ of *mandamus*. It is true that before the writ could issue the bondholders must have recovered a judgment at law on their bonds. *Bath County v. Amy*, 13 Wall., 247 ; *Graham v. Norton*, 15 id., 427.

It may be replied to this that the bondholders cannot lay the necessary foundation for the writ of *mandamus* in the United States courts, because they are prohibited from suing the state by the eleventh amendment to the constitution of the United States. But this fact may prove that there is no remedy for the complainants in the United States courts. It certainly does not follow that because there are obstacles to the adoption of the plain legal remedy therefore the remedy is in equity. It might as well be claimed that because the bondholder could not go into a court of law and secure a judgment against the state upon his bonds he might therefore go into equity and seek a decree against the officers of the state for the amount due on his bonds.

When the eleventh amendment to the constitution declares "that the judicial power of the United States shall not be construed to extend to any suit at law or in equity commenced or prosecuted against one of the United States by citizens of another state, or subjects of any foreign state," the purpose is clear to exempt states from suits upon their contracts, either at law or in equity; and the fact that this amendment interposes an obstacle to a suit at law against a state does not give a court of equity jurisdiction to enforce the same contract on the pretext that there is no remedy at law. Suits in both forums against a state are prohibited.

It is evident, therefore, that should this bill come on for final hearing the decree prayed for could not be granted. We may, however, consider the bill as one for injunction only, and the question now presented is, Can and ought the court to allow the injunction to go as prayed for?

It is claimed by the bill and conceded by counsel for defendants that the bonds of the state of Louisiana held by the complainants are contracts, that the laws under which these bonds were issued, and which provide for the levy and collection of taxes to pay the interest and reduce the principal, and which declared that the same should be annually continued until the principal and interest of said bonds were fully paid,—that these provisions of law entered into and formed a part of the contract between the state and the bondholder just as completely as if the terms themselves were inserted in the body of the bonds. The state has, therefore, contracted that, at a certain date named in the bonds, she will pay the principal; that in the meantime she will pay the interest semi-

annually to the holder of the bonds, and, as an assurance that this part of her contract will be performed, she promises further that she will levy and collect an annual tax to make these payments, and that the revenue raised by this tax shall be set apart for the purpose of paying said interest and principal.

It is conceded that the state has made this contract with the complainant in this case. Now, to what end is the injunction sought in this case? Is it to compel the officers of the state to execute the contracts of the state by estimating, levying, collecting and applying to the payment of the bonds the tax originally provided by law for the payment of the interest and the redemption of the principal? It is true the prayer for injunction is that the officers of the state may be restrained from hindering or delaying the estimate, levy and collection of that tax, etc. But as the defendants are the officers whose duty it is to estimate, levy and collect, it is clear that such an injunction from this court would be mandatory and compel the performance of the affirmative acts.

The first question presented by the prayer for injunction is: Can the officers of the state be compelled by an injunction to do an affirmative act? The complainant claims that the funding bill and the act of March 14, 1874, which in effect prohibit the collection of taxes for the payment of the principal and interest of the outstanding bonds of the state, are unconstitutional, and therefore void. If this be conceded, then the case is in the same plight as if the acts just named had never been passed, and as if the officers of the state, without pretense of warrant of law, were refusing to levy and collect the taxes which the state had agreed should be levied and collected and applied to the payment of these bonds. Has this court the power to compel them by mandatory injunction to do an affirmative act?

The authorities are adverse. The case of *Walkley v. City of Muscatine*, 6 Wall., 483, was a bill in equity to compel the authorities of the city of Muscatine to levy a tax upon the property of the inhabitants for the purpose of paying the interest on certain bonds issued by the city. It appeared that a judgment had been recovered in the same court against the city for \$7,666, interest due on the bonds held by plaintiff; that execution had been issued and returned unsatisfied, no property being found liable to execution; that the mayor and aldermen had been requested to levy a tax to pay the judgment, but had

refused; that the city authorities possessed the power under their charter to levy a tax of one per cent. on the valuation of the city property, and had made a levy annually, but had appropriated the proceeds to other purposes, and had wholly neglected to pay the interest upon the bonds. The bill prayed that the mayor and aldermen might be decreed to levy the tax and appropriate so much of the proceeds as might be sufficient to pay the judgment, interest and costs.

Upon this case the supreme court says: "We are of opinion that complainant has mistaken the appropriate remedy in the case, which was by writ of *mandamus* from the circuit court."

We have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of *mandamus*. An injunction is generally a preventive writ, not an affirmative remedy. It is sometimes used in the latter character, but this is in cases when it is used by the court to carry into effect its own decrees, as in putting the purchaser under a decree of foreclosure of a mortgage into possession of the premises. Even the exercise of this power was doubted till the case of *Kershaw v. Thompson*, 4 Johns. Ch., 609, in which the learned chancellor, after an examination of the cases in England on the subject, came to the conclusion he possessed it, not, however, by the writ of injunction, but by the writ of assistance.

In *Rogers Locomotive Works v. Erie Railway Co.*, 20 N. J. Eq., 379, the court after a learned review of all the cases, both English and American, bearing upon the subject, announced the conclusion that a mandatory injunction will not be ordered upon a preliminary or interlocutory motion, but only upon final hearing, and then only to execute the decree or judgment of the court. It is only in cases of obstruction to easements or rights of like nature, that maintaining a structure as a means of preventing their enjoyment will be restrained, and the structure ordered to be removed as part of the means of restraining the defendant from interrupting the enjoyment of the right. To the same effect is the case of *Audenreid v. Railroad Co.*, 68 Penn. St., 370.

It is clear to my mind that the injunction asked for falls within the category of mandatory injunctions and cannot, therefore, be granted on motion.

But the fatal objection to the motion of complainant is found in the character of his bill. It is either a suit in effect

against the state of Louisiana, or, if not, the parties defendant are mere nominal parties, having no real interest in the controversy. In either case no decree can be made in the cause. This case is clearly distinguishable from the cases of *Osborn v. The Bank of The United States*, 9 Wheat., 738, and *Davis v. Gray*, 16 Wall., 203, and other cases cited by complainant.

In the case of *Osborn v. The Bank*, the bill was filed by the bank to restrain Osborn, who was auditor of the state of Ohio, from acting under a void law of a state in the collection of a tax levied upon the bank, and for a decree against Curry, the late treasurer, and Sullivan, the incumbent treasurer, and Osborn, the auditor, for money illegally collected by them from the bank.

It was alleged in the bill that neither Curry nor Sullivan held the money as officers, but individuals. The court in this case held that the suit was well brought, because the state was not nominally a party to the record, and the parties made defendant had a real interest in the cause, since their personal responsibility was acknowledged, and, if denied, could be demonstrated.

In the case of *Davis v. Gray*, Davis, who was defendant in the court below, and who was named upon the record as governor of Texas, was sought to be enjoined from casting a cloud upon the title of complainant to certain lands in Texas by locating warrants thereon in pursuance of a void and unconstitutional enactment of the state. Although he professed to act as governor, he was impairing the rights of complainant without the authority of any valid law; he was acting in his own wrong and upon his own responsibility, and was personally liable.

In both these cases the object was to restrain individuals holding public offices from doing acts to the injury of complainant, for which there was no legal warrant, and by the doing of which they incurred a personal liability. How different is the case under consideration. Here is an attempt to compel the public officers of a state to do positive and affirmative acts as such, to compel them to carry out what the complainant conceives to be the law of the state, not in accordance with their own sense of duty and their own interpretation of the law. In the case of *Kentucky v. Dennison*, Governor, 24 How., 109, it was held that neither the congress nor the courts of the United States could coerce a state officer, as such, to

perform any duty imposed upon him by act of congress. Does it not follow, *a fortiori*, that a court of the United States cannot compel the governor of a state to execute a law passed by the state?

In *Osborn v. The Bank*, and *Davis v. Gray*, it was held that a United States circuit court might, in a proper case of equity, enjoin a state officer from executing a state law in conflict with the constitution or a statute of the United States, when such execution would violate the rights of complainant. But no case has yet decided that a circuit court of the United States can compel the executive and administrative officers of a state to execute the laws of the state.

The dilemma is this: If the suit is against the defendants in their official character, and the claims made upon them are in their official character, the state may be considered a party to the record. *Madrazo v. Governor of Georgia*, 1 Pet., 110. If the suit is against the officers as individuals merely, and the offices they hold are given merely to describe their persons, they have no interest in the subject-matter, and no decree should go against them.

In the view I have taken of the case, I have conceded what complainants claim, that the funding bill and the act of March 14, 1874, are both unconstitutional and void, and have regarded the bill just as if those acts had never been passed, to wit, a bill to compel the defendants, officers of the state, to execute its laws. This may be done in the case of the officers of municipal corporations, but the sovereign power of a state cannot be so coerced. To do so would be to substitute this court for the executive officers of the state; to supplant their views of duty and the obligations imposed upon them by their official oath by the discretion of this court and its official oath. In other words, it would be an undertaking upon the part of this court to administer the state government. This the court has no power and no inclination to do.

An action against the executive officers of a state to compel them to comply with the contract of the state is a suit against the state and in violation of the constitution of the United States.

In my judgment this is, to all intents and purposes, a suit against the state. The officers of the state, including the chief executive, are sued in their official capacity to compel them to execute the laws of the state. It is a suit to enforce a contract

of the state to pay money. The officers are not sued as individuals who happen to be in public office, to prevent them from doing some act to the prejudice of complainant not warranted by law, as was the case in *Osborn v. The Bank*, and *Davis v. Gray*. If a suit like this can be sustained, then the eleventh amendment to the constitution of the United States is waste paper.

For the reasons stated the motion for injunction is overruled.

MARSH *v.* BENNETT.

(Circuit Court for Michigan : 5 McLean, 117-131. 1850.)

Opinion by WILKINS, J.

STATEMENT OF FACTS.—Motion of Mr. Romeyn, of counsel for defendant Hill, to dissolve injunction heretofore allowed in this case, founded on the bill of complaint, and the allowance of the injunction by the court, without notice, according to the indorsement on the bill, and the records, files and entries in the case, and on the answer filed by the said defendant, George W. Hill.

The bill was filed on the 7th day of July, 1846, and the injunction allowed on the same day. There does not appear to have been any notice given to the defendants, or either of them, according to the provisions of the fifth section of the act of congress of the 2d of March, 1793, which provides that the writ of injunction “shall not be granted in any case, without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving the same.” And the fifty-fifth rule of practice for the courts of equity of the United States, incorporating this provision of the statute, enjoins due notice on the adverse party prior to granting any special injunction. There is no proof of notice on the files, and no proof exhibited now that notice was ever given. The injunction, therefore, would now be dissolved, had not all the parties waived the proof of such notice by their voluntary appearance. The provision of the statute being designed for the benefit of defendants, the proof of the notice required by the statute may be waived either before or after injunction issued ; and regular reasonable notice will be presumed after an appearance.

This defendant, George D. Hill, by his solicitors, Miles and Wilson, entered his appearance on the 29th of July, 1846 ; and the other defendants, Henry D. Bennett and George N. Gilbert,

likewise voluntarily entered their appearance, by O. Hawkins, their solicitor, on the 14th day of July, 1846. On the 31st of August following, this defendant, Hill, filed his separate answer to the bill of complaint, and on the 20th of October, 1846, his second separate answer. The other defendants never have answered. These several acts upon the part of the defendant Hill, and the appearance of the other defendants, supply the want of proof of the reasonable notice required by the statute for the protection of the rights of defendants.

But the defendant Hill, in order to sustain this motion, further relies upon the equities exhibited in his answer, which chiefly sets forth an assignment to him, by Henry D. Bennett, on the 19th day of January, 1846, of all the goods, chattels, book accounts, claims and demands, and personal estate of every kind, of the late firm of Bennett & Ford, then (by the previous dissolution of the said firm) the property of the said Bennett, for the purpose expressed in the transfer to him, and including therein a note of the defendant, George W. Gilbert, for \$3,125, with interest from the 15th of January, 1846. This assignment to Hill is on certain conditions, and for certain uses and purposes, and upon certain trusts therein expressed.

The assignor first provides for the payment of certain domestic creditors, in the order in which they are named in the first class absolutely, and to the whole amount of their respective claims. And after the full payment of these creditors, provision is then made for the *pro rata* distribution, among the foreign creditors of the firm of B. & F., from the residue of the fund assigned; providing, and expressly declaring that the assignee or trustee "shall first appropriate all the proceeds of the trust to the payment, in the order previously prescribed and set forth, of all the creditors therein provided for, who shall not, at the time of making any payment or dividend, have made by themselves or attorneys, any costs or expenses upon their claims; and that the claim or claims of any creditor or creditors of the said firm who shall, at the time of making any payment or dividend, have made or occasioned any cost or expense upon their claims, by any resort to any proceeding having a tendency to interfere in any manner with or prevent or obstruct the easy and economical execution of the trust, shall be postponed, and no payment whatever thereafter be made thereupon, until all the other creditors shall have

been paid in full : after which the remaining proceeds shall be first applied towards the payment, *pro rata*, of all such claims upon which costs have been made, in proportion to the present amount of said claims, exclusive of costs, so far as the same may be sufficient or necessary to satisfy such claims." The answers disclose the material facts of the case.

On the 1st day of January, 1846, the firm of Bennett & Ford, being largely indebted to certain New York merchants for merchandise purchased during the previous summer and fall, and also indebted to certain persons residing in their vicinage, dissolved their copartnership ; Ford, the retiring partner, on the same day, assigning and selling to Bennett all his interest in the stock of goods, books of account, etc., the property of the said copartnership, "for the purpose of paying off" the creditors of the said firm, and closing the concern. On the 15th of the same month the said Bennett sold and delivered to George W. Gilbert the stock of merchandise in the store lately owned by the said copartners for the sum of \$3,125, and took his note of the same date for that sum, payable in one year. On the 19th of January, but a few days after the dissolution of the partnership, and the sale to Gilbert (all within three weeks), Bennett makes the assignment to the defendant Hill, as set forth in his answer, with the preferences, and limitations, and trusts, therein contained.

No period is fixed in the assignment when the trust is to be closed. It comprehends the copartnership estate of the firm of B. & F., viz., "the claims, demands and personal estate of every kind, which recently were the property of the said copartners, and then the property of said Bennett."

The assignor Bennett divides the creditors of Bennett & Ford into two classes, and designates a preference for the first class in payment. Annexed to the assignment, and forming a part of the same, is the schedule of property assigned, estimated by the assignor at \$4,749.19, inclusive of Gilbert's note for \$3,125 given expressly for the stock of goods which had been, "during the previous summer and fall," purchased on credit by B. & F. from the foreign creditors composing the second class.

The first class of creditors are those who reside in Ann Arbor and its vicinity, and are directed to be paid first the full amount of their claims in the order in which they are named. Their claims are stated at \$849.19, which amount with the

claims of the other creditors not enumerated by name, but designated generally as "residing in neighboring towns," together with the expenses of the trust, will, at a reasonable estimate, bring the first payment to at least \$1,200; leaving, for *pro rata* distribution among the second class of creditors (chiefly—yea, with one exception—merchants residing in the city of New York, who had, "the previous summer and fall," furnished the firm of B. & F. with their stock of goods on credit), the sum of \$3,549.19.

The amount stated to be due, in schedule 3, to these foreign creditors is \$6,205.84; to meet which the above balance of \$3,549.19 (if it ever could reach even that amount) was designed for *pro rata* distribution, but with the express provision by the assignor Bennett, that, if any of this last list of creditors should commence, or have commenced, any legal proceedings for the recovery of their claims, such creditors should be postponed from any payment out of the trust fund until all the other creditors, domestic and foreign, should have been paid in full, which from the character of the assignment and the amount appropriated for distribution, would, of course, be forever; or, in other language, such of the creditors who might bring suit, unless they all did so in second class, are excluded from the fund.

[NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

POOR v. CARLETON.

(Circuit Court for Massachusetts: 3 Sumner, 70-83. 1837.)

BILL to enjoin the sale or transfer of certain certificates of stock.

Opinion by STORY, J.

STATEMENT OF FACTS.—The motion to dissolve the injunction granted, in this case, has been made and argued by the counsel for the defendants upon the general ground that, by the rules of courts of equity, after the answers have come in, denying the whole equity of the bill, the defendants are entitled to have the injunction dissolved. On the other hand, the plaintiff insists that the motion ought not to be granted, upon the ground of irreparable mischief; and in support of the argument he has offered and read certain depositions to establish that one of the principal defendants is insolvent, and another is of low character, indigent and irresponsible, and

that the third is a minor; and if the certificates of stock stated in the bill are transferred, or payment of the sums due and recoverable on them is received by the defendants, there will, in the event of the suit being sustained, be an irreparable loss of the whole property to the plaintiff. The defendants insist, in reply to this statement, that the affidavits are not, in this stage of the cause, admissible for the purposes alleged; and that if they are, the case made by them of insolvency, and low and irresponsible character, will not justify the court in the extraordinary step of continuing the present injunction, after such a full denial by the answer of the whole equity of the bill.

In the first place, let us consider the ground of the defendants, as to the right to have the injunction dissolved, upon the coming in of the answer. This, it is to be observed, is not the case of the common injunction issued against the defendants for not appearing, or for not answering the bill at the time prescribed by the practice of the court. In such cases, which usually occur in bills to stay proceedings at law, it is of course to dissolve such an injunction, if the answer denies the whole merits; and the plaintiff will not be permitted to read affidavits in contradiction to the answer, upon the motion to dissolve the injunction. This is sufficiently apparent from the statements made by Mr. Eden, in his valuable book on injunctions. *Eden on Injunct.*, 88, 108, 109, 118, 326.

But the present case is one of a special injunction granted to restrain the negotiation of the certificates, and the receipts of payment thereon, until the further order of the court. Now, in such cases, there are two points which seem well established in practice; first, that the dissolution of the injunction is not of course upon the coming in of the answer, denying the merits; and secondly, that upon the motion to dissolve an injunction, the plaintiff, under some circumstances, is entitled to read affidavits in contradiction to the answer, not indeed to all points, but to many points. Mr. Eden (p. 326) asserts, in broad terms, that "there are few points of practice which have been more discussed, or which are more satisfactorily established, than that by which the right of the plaintiff has been established to read affidavits on the motion to dissolve in contradiction to the defendant's answer. This is, perhaps, stating the doctrine more broadly than the authorities will justify.

The main distinctions, which seem supported by the author-

ities, or at least by the weight of authority, are these: In the first place, in cases of special injunctions, if the whole merits are satisfactorily denied by the answer, the injunction is ordinarily dissolved; but there are exceptions to the doctrine, and these, for the most part, are fairly resolvable into the principle of irreparable mischief: such as cases of asserted waste, or of asserted mismanagement in partnership concerns, or of asserted violations of copyrights, or of patent rights. In cases of this sort, the court will look to the whole circumstances, and will continue or dissolve the injunction in the exercise of a sound discretion. This doctrine is, as I think, fully borne out by Lord Hardwicke in *Potter v. Chapman* (Amb. 99; S. C., 1 Dick., 146); by Lord Talbot in *Gibbs v. Cole* (3 P. Will., 255); by Lord Kenyon in *Strathmore v. Bowes* (2 Dick., 673; S. C., 1 Cox, 263; 2 Bro. Ch., 88); by Lord Eldon in *Norway v. Rowe* (19 Ves., 153; and *Peacock v. Peacock*, 16 Ves., 49). See, also, *Isaac v. Humpage*, 1 Ves. Jr., 427; S. C., 2 Bro. Ch., 463; Mr. Swanston's note to *Smythe v. Smythe*, 1 Swanst., 254, note (b); Wyatt, Pr. Regist., 236; Hendis, Ch. Pr., 596. A doubt, too, in point of law, will furnish a sufficient ground against dissolving an injunction; and was so ruled in *Maxwell v. Ward*, 11 Price, 17. Indeed, Mr. Chancellor Kent, in *Roberts v. Anderson*, 2 John. Ch., 204, laid down the proposition generally, that the granting and continuing of injunctions must always rest in sound discretion, to be governed by the nature of the case.

It is true that it was said by Lord Eldon, in *Clapham v. White*, 8 Ves., 36, 37, that "if the answer denies all the circumstances upon which the equity is founded, the universal practice, as to the purpose of dissolving or not reviving the injunction, is, to give credit to the answer; and that is carried so far that, except in the few excepted cases, though five hundred affidavits were filed, not only by the plaintiff, but by many witnesses, not one could be read as to this purpose." This is strong language; but many qualifications must be engrafted on it, as will be manifest from the learned chancellor's own decision in *Peacock v. Peacock*, 16 Ves., 49, and *Norway v. Rowe*, 19 Ves., 144, on which I shall presently comment; and, indeed, as his own exceptive words, "in the few excepted cases," clearly import. I confess that I should be sorry to find that any such practice had been established, as that a special injunction should, at all events, be dissolved

upon the mere denial by the answer of the whole merits of the bill. There are many cases in which such a practice would be most mischievous; nay, might be the cause of irreparable mischief. The true rule seems to me to be, that the question of dissolution of special injunction is one which, after the answer comes in, is addressed to the sound discretion of the court. In ordinary circumstances the dissolution ought to be ordered, because the defendant has *prima facie* repelled the whole merits of the claim asserted in the bill. But extraordinary circumstances may exist, which will not only justify, but demand, the continuation of the special injunction. This, upon the principles of courts of equity, which always act so as to prevent irreparable mischiefs and general inconvenience in the administration of public justice, ought to be the practical doctrine; and I am not satisfied that the authorities, properly considered, do establish a contrary doctrine. If they did, I should hesitate to follow them in a mere matter of practice, subversive of the very ends of justice.

Indeed, there are numerous cases which show the gradual meliorations or changes, often silent and almost unperceived, which have been introduced into the practice of the courts of equity, to obviate the inconveniences which experience has demonstrated, and to adapt the remedial justice of these courts to the new exigencies of society. Thus, for example, thirty years ago, it seems to have been thought by Lord Eldon, that an injunction to restrain the negotiation of a negotiable instrument was an extraordinary interference of the court, and that, upon the coming in of the answer, the case stood exactly as if the case had been upon the common injunction to stay proceedings at law. *Berkley v. Brymer*, 9 Ves., 355, 356. And the case was then thought distinguishable from that of an injunction granted to stay waste, in which the court would interfere, on account of the danger of irreparable mischief, and continue the injunction to the hearing. But this doctrine has been since completely abandoned; and in *Hood v. Astor*, 1 Russ., 412, Lord Eldon himself, adverting to the supposed practice not to interfere in cases of negotiable securities to prevent their negotiation, said: "I do not recollect such a doctrine to have been at any time in my experience the law of this court. It is true that applications for injunctions of the sort now moved for have become much more frequent than they were in former days. But the reason is that, in the

present state and form of the transactions of mankind, there is an increased necessity for them; a necessity, too, which is not likely to become less." This last doctrine has been in the fullest manner recognized and acted upon by the supreme court of the United States. *Osborn v. Bank of United States*, 9 Wheat., 738, 845.

But supposing the doctrine were as comprehensive, as to the dissolving of a special injunction on the coming in of the answer, as the counsel for the defendants has contended: the question occurs whether it is applicable to all kinds of answers which deny the whole merits of the bill, or whether it is applicable to such answers only as contain statements and denials by defendants consonant of the facts, and denying the allegations upon their own personal knowledge. It seems to me very clear, upon principle, that it can apply to the latter only. The ground of the practice of dissolving an injunction upon a full denial, by the answer of the material facts, is that, in such case, the court gives entire credit to the answer, upon the common rule in equity that it is to prevail, if responsive to the charges of the bill, until it is overcome by the testimony of two witnesses, or of one and other stringent corroborative circumstances. But it would certainly be an evasion of the principle of the rule if we were to say that a mere naked denial by a party who had no personal knowledge of any of the material facts were to receive the same credit as if the denial were by a party having an actual knowledge of them. In the latter case the conscience of the defendant is not at all sifted; and his denials must be founded upon his ignorance of the facts, and merely to put them in a train for contestation and due proof to be made by the other side. This distinction is alluded to and relied on by the supreme court in *Clarke v. Van Reimsdyk*, 9 Cranch, 160, 161. See, also *Hughes v. Garner*, 1 Young & Coll., 328.

The sole ground upon which the defendants are entitled to a dissolution of an injunction upon an answer is that the answer in effect disproves the case made by the bill by the very evidence extracted from the conscience of the defendant, upon the interrogation and discovery sought by the plaintiff to establish it. But what sort of evidence can that be which consists in the mere negation of knowledge by the party appealed to? Such negation affords no presumption against the plaintiff's claims, but merely establishes that the defendant

has no personal knowledge to aid it or to disprove it. It is upon this ground that it has been held, and, in my judgment, very properly held, that if the answer does not positively deny the material facts, or the denial is merely from information and belief, it furnishes no ground for an application to dissolve a special injunction. The cases of *Roberts v. Anderson*, 2 Johns. Ch., 202, 204; *Ward v. Van Bokkelen*, 1 Paige, 100; *The Fulton Bank v. New York & Sharon Canal Co.*, 1 Paige, 311; *Rodgers v. Rodgers*, 1 Paige, 426, are fully in point.

The importance of this distinction is manifest in the present case. Here the defendants are merely the heirs and representatives of the original party (Isaac Carleton) deceased; and the original transactions detailed in the bill, and under which the plaintiff asserts his title to relief, took place from twenty-eight to thirty years ago; and there is no pretense to say that any of these defendants have any personal knowledge of these transactions. This is sufficiently apparent from their answers. But by a certificate of the births of the defendants, which is very properly in the case for the present purpose, it appears that the principal defendants, Richard Carleton and Isaac Carleton (the other defendant being yet a minor), were, at the time of the transactions, so young as to demonstrate that they could have no personal knowledge, Richard being then only nine or ten years old, and Isaac only two or three years old. For the purpose, then, of dissolving the injunction, their answers cannot be treated as competent evidence to repel the allegations of the bill, or to disprove the transactions on which it is founded.

In regard to the admission of the affidavits, there are other considerations which require attention. All the affidavits, except that of Josiah Barker, are simply to the point of the insolvency and indigence of the defendant Isaac Carleton, and of the low character, intemperance and indigence of the defendant Richard Carleton. They satisfactorily, to my mind, establish the facts, if they are admissible in evidence; and that they are so admissible I cannot doubt, for they are merely to collateral matters, not touched by or contradictory to the answers. *Taggart v. Hewlett*, 1 Meriv., 499, and *Morgan v. Goode*, 3 Meriv., 10 and other cases cited by Mr. Swanston in his note to *Smythe v. Smythe*, 1 Swanst., 254, sufficiently establish this position. See, also, *Eden on Injunctions*, 109. Without doubt the defendants are at liberty to repel such affidavits by

counter affidavits to the same points; for otherwise they might be compromitted by statements which they could have no opportunity to answer.

In regard to the affidavit of Barker, that is of a very different character, and goes to the proof of the original transactions stated in the bill, and is in direct contradiction to the negative allegations in the answers. It was not filed when the injunction was obtained; but it has been filed since the answers have come in. Under these circumstances the question arises, whether it is admissible to be read on the present motion.

In cases of the common injunction, it has been already stated that, after an answer denying the whole facts and merits, affidavits cannot be read to contradict the answer, on the motion to dissolve. The language of Lord Eldon, in *Clapham v. White*, 8 Ves., 35, 36, already cited, is full to this purpose. But in cases of special injunctions, affidavits filed in support of the original injunction may be read, upon the motion to dissolve, in contradiction to the answer, in special cases, that is to say, in cases of irreparable mischief, such, for example, as of waste. See *Eden on Injunctions*, 326; *Peacock v. Peacock*, 16 Ves., 49, 50; *Smythe v. Smythe*, 1 Swanst., 253, and cases cited in note (b); *Norway v. Rowe*, 19 Ves., 144; *Charlton v. Panther*, 19 Ves., 149, note (c). But it has been held by Lord Eldon, that even in cases of waste such affidavits are not admissible to found a motion for an injunction after the answer (none having been previously granted); because, if the affidavits are filed before the answer, the defendant possesses an opportunity of explaining or denying the facts stated in these affidavits; but if the plaintiff reserves his affidavits until after the answer is filed, he does not deal fairly with the defendant, who is entitled, before answer, to be apprised of the points on which the plaintiff rests his case. *Smythe v. Smythe*, 1 Swanst., 253. I confess myself not so strongly impressed with the force of the reasoning as the learned judge seems to have been. And it would be very easy to obviate the objection, by allowing the defendant, by his own as well as other counter affidavits, to repel the statement, which he has not, by his answer, had an opportunity to meet and explain or deny.

There is another qualification of the doctrine in cases of irreparable mischief, and that is, that, though the original affidavits may be read as to other facts contradicted by the

answer, they cannot be read in support of the title of the plaintiff which is contradicted by the answer. The ground of this exception seems to be that the court ought not collaterally to decide upon the title. So the doctrine was established in *Norway v. Rowe*, 19 Ves., 144, 157. Whether that doctrine stands upon a satisfactory foundation is quite a different question. Upon general principles, I cannot well see why the court, to prevent irreparable mischief, may not, upon an application to continue an injunction, look to affidavits in affirmance of the plaintiff's title, not so much with a view to establish that title, but to see whether it has such a probable foundation in the present stage of the cause as to entitle the plaintiff to be protected against irreparable mischief, if upon the hearing it should turn out to be well founded.

In cases of irreparable mischief—and I think the present case properly falls under that head, or stands upon the same analogy—it seems to me that the more fit course for the due administration of public justice is to follow out the suggestions of Lord Eldon himself, in the case of *Peacock v. Peacock*, 16 Ves., 51. His lordship in that case, which was upon a motion respecting an injunction in a case of partnership, said: “With regard to the point of practice as to reading affidavits, this court has interfered in these cases of partnership upon principles not the same, but analogous to those on which it interposes in the case of waste. In that instance, if the fact can be maintained, the objection is proved with very little effect, that the parties may proceed, vying with each other by affidavits without end. The court does permit affidavits, taking care to prescribe limits according to the circumstances of each case.” This, it appears to me, is the true view of the matter. The admission of the affidavits, whether filed before or after the answer, whether they are to the title of the plaintiff or to the acts of the defendant, although they are contradictory to the answer, ought to rest in the sound discretion of the court, according to the circumstances of each particular case, without the court's binding itself by any fixed and unalterable rules as to the exercise of that discretion. This seems to have been the course which commended itself to the mind of that great equity judge, Mr. Chancellor Kent. See *Roberts v. Anderson*, 2 John. Ch., 202, 205. But see *Eastham v. Kirk*, 1 John. Ch., 444.

I have looked into the earlier practice of the court of chan-

cery, in order to satisfy myself whether, in all cases of irreparable mischief, the court had positively limited its own discretion, under all circumstances, in the manner supposed by the modern authorities. Mr. Dickens, whose great experience in the practice of the court has been thought by Lord Eldon to entitle his opinion to great weight in such matters (*Norway v. Rowe*, 19 Ves., 154), in reporting the case of *Strathmore v. Bowes*, 1 Dick., 673; S. C., 1 Cox, 263; 2 Bro. Ch., 88, has, it is true, given us his view of the practice in the following terms: "On application to continue or dissolve an injunction, either of course or special, I have always understood it to be the rule that, though affidavits are not to be read to support the plaintiff's equity, that is, his right to come into the court, when denied by the defendant's answer, yet in injunctions to stay waste, or in the nature of waste, when the waste sworn to and upon which the injunction is grounded is denied, the court will admit proof by affidavit in support of the facts." This passage seems certainly corroborative of what has been supposed to be the later general practice. Yet it is difficult, notwithstanding Mr. Dickens' subsequent explanations of the grounds of this practice, to perceive what solid distinction there is, or ought to be, between admitting affidavits as to title and affidavits as to the facts of waste; for each of them are equally in opposition to the answer in relation to the material points of relief. Mr. Dickens at that time also thought, that affidavits by the defendant, in support of his answer, were not admissible. But Lord Eldon considers the present practice to be, or at least that it ought to be, upon principle, otherwise. However, Lord Eldon does not understand Mr. Dickens to mean to assert, what the passage above cited may seem at first sight to import; for he says, in *Norway v. Rowe*, 19 Ves., 164, "Mr. Dickens, however, did not mean, that if there is, by the answer, a total denial of the plaintiff's title to stay waste, the plaintiff could not by affidavit assert his title, contradicting the answer in that respect:" a concession, if well founded, which removes the statement of Mr. Dickens out of the present case. See, also, *Eden on Injunctions*, p. 328.

The truth seems to be, that, in cases of this sort, the practice has been shifting, from time to time, to meet the new exigencies of society and the pressure of peculiar circumstances; and the court has never suffered itself to be entrapped by its own rules, so as to interfere with the purposes of sub-

stantial justice. The practice in America has, I believe, on this subject, become more liberal than it is in England; and if it were necessary, I should not hesitate to admit affidavits to contradict the answer, for the purpose of continuing or even of granting a special injunction, where I perceived that, without it, irreparable mischiefs would arise. In the present case, there are circumstances which might free me from the necessity of asserting so broad a doctrine. But I wish rather to dispose of the case upon the general ground that the granting and dissolving injunctions in cases of irreparable mischief rest in the sound discretion of the court, whether applied for before or after answer; and that affidavits may after answer be read by the plaintiff to support the injunction, as well as by the defendant to repel it, although the answer contradicts the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer.

The motion to dissolve the injunction is accordingly refused.

BROWN v. THE PACIFIC MAIL STEAMSHIP COMPANY.

(Circuit Court for New York: 5 Blatchford, 525-537. 1867.)

STATEMENT OF FACTS.—The plaintiffs in this case are subjects of Great Britain. The defendants are the Pacific Mail Steamship Company, the Atlantic Mail Steamship Company, and certain individuals, all of whom, except one Butterfield, were residents of New York. The two companies were incorporated under the laws of New York.

Opinion by BLATCHFORD, J.

This case, except as to the defendant Butterfield, is one where the court clearly has jurisdiction of the parties. The plaintiffs set out that they are the owners of three thousand five hundred shares of the capital stock of the Pacific Mail Steamship Company. This company, it appears, has a capital now of \$20,000,000, divided into two hundred thousand shares of \$100 each. The bill then alleges that the firm of Brown Brothers & Co., of the city of New York, have standing in their names seventy-seven thousand eight hundred and thirty-nine shares of the capital stock of this company. It then sets out the character of the Pacific Mail Company, its progress, and the development of its business, and alleges certain reasons which existed at the time for making a certain contract, which was made in October, 1864, with Brown Brothers & Co.

These reasons were, in substance, the creation of a permanent share-holding body, not liable to the changes and fluctuations of the stock market. By this agreement it appears that some ten persons associated themselves together and bought ten thousand shares of stock, which at that time was one-quarter of the entire capital, and that they made Brown Brothers & Co. trustees of that stock.

The written agreement in regard to this stock, which is set out in the bill, shows that the arrangement was to continue in force until the 1st of December, 1868. The provisions of the agreement substantially are, that the parties to it are not to sell their stock without having first offered to sell it to the rest of their associates, at a price not above the then current market value, and, in case of their declining to take it, without next offering it to Brown Brothers & Co.; but any one of the parties is to be at liberty to withdraw on those terms at any time. The agreement also takes the shape of an irrevocable power of attorney to Brown Brothers & Co. to vote upon the stock; and all increase of such shares of stock, by stock dividends, until the 1st of December, 1868, is to come under the same agreement. In this respect the agreement seems to differ very little from a mere power of attorney, or proxy to Brown Brothers & Co., to vote upon these shares, with the addition that the power is irrevocable, and that there are certain privileges reserved to the owners of the stock in regard to the manner of dealing in it, and withdrawing from the arrangement. I am unable to perceive anything in this agreement contrary to public policy, or anywise open to objection; and there is no affidavit produced here, on the part of any one concerned in this arrangement—any one who is a principal of these agents or trustees, complaining of anything wrong in regard to the administration of the trust, or that there is any prejudice by having the stock in the position in which it is placed.

Then there is a second agreement set out, whereby, as the bill alleges, the Atlantic Mail Steamship Company became stockholders in the Pacific Mail Company to a certain amount of stock, and made Brown Brothers & Co. their trustees under an agreement running for the same length of time, namely, until December 1, 1868, with an irrevocable power of attorney to Brown Brothers & Co. to vote upon such stock, and a provision that the stock was not to be sold unless it was offered to

be sold first to the Pacific Mail Company. For all the substantial purposes of this motion, this agreement is, in substance and effect, the same as the first one.

The bill then sets out the further development of the Pacific Mail Company on the Atlantic side, and the extension of its operations by a line to China and Japan, consisting of large steam vessels, and the further increase of its capital stock, in November, 1866, to \$15,000,000, and in January, 1867, to \$20,000,000. It also states, what is quite apparent, that this increase of stock diminished the proportion which the stock standing in the names of Brown Brothers & Co. bore to the entire stock. It then sets out that the number of shares under the first agreement has by the increase of it, through stock dividends, increased to twenty-six thousand six hundred and sixty-six shares, which number of shares is held by Brown Brothers & Co. in trust under that agreement. It also states that the number of shares held by Brown Brothers & Co. under the second agreement is twenty-six thousand six hundred and sixty-six. It then sets out the facts connected with a third lot of shares standing in the name of Brown Brothers & Co., to the number of twenty-four thousand three hundred and fifteen shares, of which twenty-four thousand and seventy-two shares were issued at one time to Leonard W. Jerome, and were by him transferred to Allan McLane, trustee, and were by him transferred to Brown Brothers & Co. But I do not perceive that any relief is asked in regard to this third lot of shares.

The bill then sets out that there is an election for directors of the Pacific Mail Company coming on to-day at 12 o'clock; that four of the defendants, Hartson, Joslyn, Green and Butterfield have been engaged in soliciting proxies for the purpose of voting on shares of stock at such election, based upon statements such as appear in a circular signed by them, of which a copy is annexed to the bill; and that Mr. Hartson has threatened to have the directors of the company changed; it then avers that the defendants Lockwood and Davenport have associated themselves with the defendants Hartson, Green, Joslyn and Butterfield for the purpose of changing the directors of the company. It then avers specifically that the charges contained in this publication by Hartson, Green, Joslyn and Butterfield are unfounded. Those charges relate generally to breaches of trust and unfaithful administration on the part of the trustees, Brown Brothers & Co. No averment is made by

the defendants, in any manner whatever, that these charges are well founded. On the contrary, the allegation in the bill that the charges are unfounded is virtually admitted by not being denied. No averment is made, on the part of the defendants, that the trusts have been improperly discharged by the trustees. The bill then sets out that, at every election that has taken place since the trusts were reposed in Brown Brothers & Co., the election has always been made by votes other than those cast by Brown Brothers & Co. In other words, as I understand, that the elections have always been unanimous, and have not been controlled by the votes cast by Brown Brothers & Co. on the shares held by them in trust. The bill then sets out that Hartson, Joslyn, Green and Charlick, and their associates, have purchased a large number of shares, some thirty thousand to thirty-five thousand, which shares stood, at the close of the books, in their names, or in the names of persons believed to be associated with them in this movement, for the purpose of getting control of the company, and that they have bought, or arranged to control, a large number of proxies, so that, without corresponding beneficial interest in the shares they represent, and without any choice by the persons who are really beneficially interested in the shares so held by them, they seek to control the election, and carry on and control the company. Upon that point an affidavit is produced, signed by Hartson, Green, Joslyn and Charlick, in which they deny that they have bought proxies, but they do not deny that they have arranged to control them. This affidavit denies nothing in the bill, except the allegation that they do not own the stock which, at the close of the transfer books, stood in their names. It is confined to the one simple point of their still owning the stock which stood in their names at that time.

The bill then avers that the parties engaged in this transaction will still be in a minority of votes, and that therefore they purpose to do certain things. No allegation or averment is set up by the defendants, by affidavit, that they do not purpose to do the things alleged, and those things, as set out in the bill, are the following: (1) To obtain an *ex parte* injunction from some court or judge forbidding Brown Brothers & Co. from voting upon the shares held by them; (2) To obtain such injunction upon the pretense that Brown Brothers & Co. have improperly acquired, or are about to improperly make use of, the shares held by them, or upon other inaccurate, ill-

founded or partial statements; (3) That such pretenses will be erroneous, unjust and wholly unfounded; (4) That the injunction will not be obtained, or, if obtained, will not be served until immediately upon such election; (5) That the effect will be to exclude Brown Brothers & Co. from voting on the fifty-three thousand three hundred and thirty-two shares held by them, whereby a minority of stockholders will succeed in choosing a board of directors, against the wishes of the majority and of the plaintiffs. No one of these averments is denied or controverted. On the contrary, by the making of the affidavit which has been made by four of the defendants upon one point, every intendment must be taken most strongly against the parties as an admission of all the matters stated in the bill which the affidavit does not controvert, although the statement in the bill of these allegations, and the absence of any denial of them, would be sufficient of itself.

The bill then sets out, as a ground of apprehension that these things may be done, that Hartson and his associates did substantially the same things, in reference to an election of directors in another company, quite recently. That is not denied. It then sets out that Hartson is the president of the Atlantic Mail Steamship Company, and that he and Green, Meigs, Joslyn, Butterfield, Seward and Dimock are directors of the Atlantic Mail Steamship Company, and control the same, and hold the great mass of the capital stock thereof. It then avers that the consequences of this meditated transaction will be disastrous to the Pacific Mail Company, and to the common interests of all the shareholders. That is not denied. The bill then points out in what manner it will be so disastrous, with considerable detail and particularity. These averments are not denied. The details are then given in the bill of what Hartson, Green, Joslyn and their associates intend to do to the injury of the plaintiffs and of other stockholders; and this averment is not denied. The bill then sets out that Hartson and his associates are a combination of stock operators and stock speculators, who are designing and intending, in this way, to control a company to whose true prosperity, and to the interests of whose shareholders, their other interests are adverse. This averment is not denied.

Certainly, if there ever was a case for relief of some kind by injunction, this case is one of that kind, to prevent the commission of so great and admitted a wrong, wholly undefended.

It is a case in which there would be no adequate remedy at law; because the law, as settled by the supreme court of the United States, in regard to the jurisdiction in suits in equity of the courts of the United States, in view of the statute, which declares that there shall be no remedy in equity where there is a plain, adequate and complete remedy at law, is, that the remedy at law must be as efficient to the ends of justice, and its complete and prompt administration, as the remedy in equity. Now, in the present case, the election, taking place under these circumstances, which it is thus admitted will be the circumstances of the case, would be perfectly legal, although accomplished in this way by a minority of the votes. There would be no ground, so far as I am able to perceive, for setting aside the election, because an injunction, obtained from a proper court having jurisdiction, had excluded certain persons from voting.

In this case, no want of time to meet the charges of the bill has been set up; no application to postpone the motion has been made; the parties have been represented by able counsel, in a hearing of some six hours, while the allegation in the bill is admitted, that the defendants intend to procure an injunction of the description alleged in the bill, without giving the plaintiffs or Brown Brothers & Co. any opportunity of being heard. As I before remarked, four of the defendants have made an affidavit upon one minor point, and have denied nothing else. They must, therefore, be held to admit everything which they do not deny. Under these circumstances, it certainly would be a reproach to the administration of justice, if these foreigners could have their property invaded in this way, by measures admitted to be wholly without any ground to support them, without any means of relief.

As to the character of the injunction asked for, it is laid down, in Judge Redfield's *Treatise on the Law of Railways* (vol. 2, § 221), that "it has been common to produce a positive effect, through an injunction out of chancery, by means of a prohibitory order," and that a mandatory order is, in courts of equity, seldom denied, unless the remedy at law is perfectly adequate. And this case presents a case eminently of equity jurisdiction—a case of irreparable injury to the plaintiffs, and a case where no such injury can be produced to the defendants. Indeed, under the averment of the bill, that these transactions of the defendants will produce great

injury to the interests of all the stockholders, and the admission, or absence of denial, of such averment, it is clear that there can be no injury to the proper interests of such of the defendants as are existing shareholders in the Pacific Mail Company, by granting an injunction; whereas it is manifest from the statements of the bill that there is a clear case of probable irreparable injury to the plaintiffs.

I have, after a careful examination of the five prayers for injunction in the bill, come to the conclusion that the first, second and third must be substantially granted; but as to the fourth and fifth, I do not see any ground for granting an injunction in regard to them. They stand on very different grounds from the first three. As to the first prayer for injunction, I grant it substantially as prayed for, except as to the defendant Butterfield, who is not a citizen of the state of New York. I do not think the court has any jurisdiction whatever of him, under any aspect of the case. Lockwood and Davenport have been served. Hartson and Joslyn are directors of the Atlantic Mail Company, and process was served upon the company at its office. Under the statute, which requires reasonable previous notice of an application for an injunction to be given to the adverse party, I think, so far as any one of the defendants who is a director of the Atlantic Mail Company and has not been served is concerned, that he has had reasonable notice, by the service on the company at its office. Hartson, Joslyn, Green and Charlick, however, come in under another aspect of the case. They have made an affidavit in this suit, which has been used to oppose this motion, and, under the circumstances, I think they are concluded from setting up a want of sufficient notice.

As to the second prayer for injunction, Butterfield must be excluded from that, of course; and I cannot grant that, as concerns the other shareholders generally of the Pacific Mail Steamship Company, and the words "and all others the shareholders of the Pacific Mail Company," which are in the prayer of the bill, must be stricken out from the injunction. I do not think I can enjoin the other shareholders without notice, or that service upon the Pacific Mail Company is to be considered, for the purpose of this second prayer, as service on such other shareholders.

The third prayer for injunction is, I think, a proper one as to the defendants served, Butterfield being, of course, excepted,

if he has been served. It is also proper as to Hartson, Joslyn, Green and Charlick, some of whom have been served, and some of whom, I believe, have not been served. But all four of them come in, under the previous remarks, because of the affidavit which they have made. As to the defendants Meigs and Seward, and many others not before mentioned, so far as they are directors of the Atlantic Mail Company, I think that they have substantially had notice. Therefore, under the third prayer, all the directors of the Atlantic Mail Company may be included in the injunction.

The fourth and fifth prayers do not, I think, fall at all within the principles upon which the first, second and third are granted; and, without expressing at length my views in regard to them, I decline to grant the injunction prayed for in them.

In regard to so much of the second prayer for injunction as seeks to extend the injunction, to forbid the defendants from voting, as proxies, for such stockholders, who are not parties and are not themselves enjoined, as have given their proxies to some of the defendants who are enjoined, the *gravamen* of the bill is, that the defendants have combined to conduct their intended operations by means of proxies obtained from shareholders; and that averment is not denied. The defendants deny that they have bought proxies, but they do not deny that they have arranged to control such proxies. I think that the court, having its hand upon Hartson and his associates in these transactions, has a right to restrain them from doing anything in that regard, either individually or as proxies; especially as the bill sets out, and it is admitted, that the means by which he is seeking to carry on this scheme is by procuring proxies. I do not mean to restrain the parties giving the proxies, because they are not parties to the suit, but I think that Hartson and his associates, no matter in what capacity they act, whether individually or as agents or attorneys, must be restrained by the court; otherwise, the whole injunction might be utterly ineffective. By the allegations of the bill, Hartson and his associates are engaged in these transactions, which the court decides are improper ones, and they, therefore, ought to be restrained in every capacity.

In regard to the petition presented by Wheeler, asking to be made a co-complainant in the bill, I think the point is disposed of by the rules in equity prescribed by the supreme court. A

case like this one was probably foreseen, and is provided for in the forty-seventh and forty-eighth of the rules of practice for courts of equity. The forty-seventh rule provides that in all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and, in such cases, the decree shall be without prejudice to the rights of the absent parties.

The forty-eighth rule provides that where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit who are properly before it, but, in such case, the decree shall be without prejudice to the rights and claims of all the absent parties. These rules have been acted upon ever since they were adopted, in reference to cases of this kind, particularly in regard to corporations where the stockholders are numerous, and reside in various places. But, independently of all that, it is apparent that, in this case, to make Wheeler, who is a citizen of the state of New York, a party plaintiff, would oust the jurisdiction of the court; and, under those circumstances, irrespective of the rules referred to, the rule of equity would be, to make the person a party defendant, and not a party plaintiff. It is not at all necessary, in order to give to Wheeler, as a stockholder in the Pacific Mail Company, the benefit of this suit, that he should be made a co-plaintiff. He may come in and contribute to the expenses of the suit, and avail himself of the benefits of it, by being made a defendant. But the forty-seventh and forty-eighth rules dispose of the whole question, and, upon the statements made in the bill, it would hardly be a proper exercise of discretion for the court to refuse to proceed in the case without making Wheeler a party plaintiff, when to make him such would oust the jurisdiction of the court in regard to the parties before it, and sufficient parties are before it to represent all the adverse interests of the

adverse parties who are properly before it. The forty-eighth rule disposes, also, of the objection taken on the part of the defendants, founded on an affidavit put in by them, that there are shareholders in the Pacific Mail Company who are citizens of the state of New York, and are not made parties defendant.

In regard to the objection raised, that an injunction cannot go against parties who have been served with process or notice because some of the defendants have not been served, I do not understand that, according to the usual practice in equity, it is not regular to proceed against the defendants who are served, and are before the court, as far as an injunction is asked against them and may be proper. An injunction is asked against the three inspectors of election, in the first place, and they have been served. The two corporations have been served. An injunction is also asked against certain individuals, some of whom have been served and some have not. In regard to parties who have not been served, the court cannot grant an injunction against them, unless they are persons holding such a position as that they can be considered a single party, for the purpose of restraining them from doing a particular act in which all are concerned—such as being members of a body of trustees or of the board of directors of a corporation. But, so far as parties are concerned, who are sought to be restrained from doing individual acts in individual matters, the court has no power to include them in an injunction without previous notice to them. That, however, is no reason why, in this case, an injunction may not go against the corporations or the inspectors of elections, or any individuals who have been served, if the case is otherwise a proper one for an injunction against them.

THE COLE SILVER MINING COMPANY v. THE VIRGINIA GOLD HILL WATER COMPANY.

(Circuit Court for Nevada : 1 Sawyer, 685-695. 1871.)

Opinion by FIELD, J.

STATEMENT OF FACTS.—This is a motion to dissolve an injunction issued upon the bill of complaint. It is made upon three grounds :

1. That Herman Glauber, who is a citizen of the state of California, is an indispensable party defendant in the suit, without whose presence the court cannot proceed to a decree.

2. That the injunction, though preventive in form, is mandatory in fact, and an injunction of this character cannot issue upon an interlocutory application.

3. That the equities of the bill are fully denied by the answer.

1. The question whether Glauber is an indispensable party depends upon the further question, whether he is materially interested in the matter in controversy, or object of the suit, and that interest would be necessarily affected by any available decree consistent with the case presented by the bill.

It is undoubtedly a general rule in equity that all persons materially interested in the matter in controversy, or object of the suit, should be made parties, in order that complete justice may be done and a multiplicity of suits be avoided. And usually when it appears that persons thus interested are not brought in, the court will order the case to stand over until they are made parties.

A court of equity, as has been said by a distinguished chancellor, delights to do complete justice, and not by halves. But sometimes, from the residence of parties thus interested, the court is unable to bring them all before it. Particularly is this so with the circuit court of the United States, which possesses no power to authorize a constructive service of process upon absent or non-resident defendants, and which can only exercise its jurisdiction in that class of cases depending upon the citizenship of the parties, where all the parties, however numerous, on one side, are from a state different from that of the parties on the other side. In all such cases the court will consider whether it is possible to determine the controversy between the parties present, without affecting the interests of other persons not before the court, or by reserving their interests. If the interests of those present are severable from the interests of those absent, such determination can generally be had, and the court will proceed to a decree. But if the interests of those present and those absent are so interwoven with each other that no decree can possibly be made affecting the one without equally operating upon the other, then the absent persons are indispensable parties, without whom the court cannot proceed, and, as a consequence, will refuse to entertain the suit. *Shields v. Barrow*, 17 How., 130; *Barney v. Baltimore City*, 6 Wall., 280.

The inquiry, then, is this: Whether Glauber possesses any

interest in the controversy, or object of the suit, which is so interwoven with that of the other defendants that no available decree consistent with the case presented by the bill can be rendered against them, which will not necessarily affect him. The suit is brought to prevent a diversion of water of which the complainant claims to be the owner by discovery and prior appropriation. The water, or, which amounts to the same thing, the exclusive use of it, is the matter in controversy, and the substantial object of the suit is to prevent any interference with such use by the defendants. Glauber, according to the allegation of the bill, is not interested in the water in controversy, but only in the tunnel by means of which the water is diverted.

Now if a decree can be rendered which will secure to the complainants the exclusive use of the water, and at the same time leave the right and interest of Glauber in the tunnel unimpaired, the objection founded upon his absence as a party defendant will not be tenable. The learned counsel of the defendants intimated on the argument of the case, that, should the court ultimately determine that the complainant is entitled to the water, it might be necessary to decree that the tunnel be filled up. If only a decree of that character can be rendered to give protection to the complainants' rights, then undoubtedly Glauber is an indispensable party. But the complainants' counsel suggest several forms in which a decree may be made protecting the asserted rights of the complainants without in any respect trenching upon Glauber's rights in the tunnel. The defendants might, for instance, be restrained from interfering with the water or performing acts to prevent the resumption by the complainants of its possession and use. It is stated that even if the defendant should not be decreed to do any specific act, such as the erection of a bulkhead or the restoring of the water diverted, a decree would not be altogether fruitless which would allow the complainants to pump the water from the bed of the Nevada Tunnel into its own tunnel, provided no counterwork should be carried on in the Nevada Tunnel to prevent such pumping; or allow the complainants to resume possession of the water at the mouth of the tunnel. A decree which would enjoin the defendants from opposing the complainants' resumption of the water in either of these modes would substantially accomplish the objects of the suit, and at the same time leave the Nevada Tunnel

and the interests of Glauber therein as they existed previously.

It would certainly be going a great way, and not entirely consistent with proper respect for my associate, who is possessed, in the circuit court, with equal authority with myself, if I should undertake to determine against his conclusions upon substantially the same representation of facts, without leave first granted for a re-argument of the question, that Glauber is an indispensable party, and thus decide, in advance of the presentation of the entire case, that no decree could possibly be rendered which would afford protection to the complainant without infringing upon the rights of the absent Glauber. I shall leave the matter to his determination, simply observing that in a case of this kind, when the absent person alleged to be interested would, if brought into court, oust its jurisdiction, I should follow the course suggested by Mr. Justice Story in *West v. Randall*, 2 Mason, 196, and strain hard to give relief as between the parties before the court.

II. The injunction, although preventive in form, is undoubtedly mandatory in fact. It was intended to be so by the circuit judge who granted it, and the objection which is now urged for its dissolution was presented to him, and was fully considered. I could not with propriety reconsider his decision, even if I differed from him in opinion. The circuit judge possesses, as already stated, equal authority with myself in the circuit, and it would lead to unseemly conflicts, if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case.

But were I not restrained by this consideration from interfering with the order of the circuit judge, I should hesitate before dissolving the injunction upon the ground stated. The benefit of the preventive remedy afforded by courts of equity in the process of injunction would often be defeated, if the remedy only extended to cases where obedience would not require any affirmative acts on the part of the party enjoined.

The owner of flumes, aqueducts or reservoirs of water might, for instance, flood his neighbor's fields by raising the sluice gates to these structures, and, if the flowing should not be speedily stayed, might destroy the latter's crops: and yet, according to the argument of the learned counsel, no injunction could issue to restrain the owner from continuing the flood,

if obedience to it should require him to do the simple affirmative act of closing his gates. The person whose fields were inundated and whose crops were destroyed, in the case supposed, would find poor satisfaction in being told that he must wait until final decree before any process could issue to compel the shutting of the gates, and he must seek compensation for the injuries his property may suffer in the meantime in an action at law.

There is no species of property requiring more frequently for its protection and enjoyment the aid of a court of equity, and particularly of its preventive process of injunction, than rights to water. For purposes of mining as well as for ordinary consumption, water is carried in the mining regions of Nevada and California over the hills and along the mountains for great distances, by means of canals and flumes and aqueducts, constructed with vast labor and enormous expenditures of money. Whole communities depend for the successful prosecution of their mining labors upon the supply thus furnished; and it is not extravagant to say that much of the security and consequent value of this species of property is found in the ready and ample protection which courts of equity afford by their remedial processes of injunctions, anticipating threatened invasions upon the property, restraining the continuance of an invasion when once made, and preserving the property in its condition of usefulness until the conflicting rights of contesting claimants can be considered and determined. The limitation of the process to cases calling for no affirmative action on the party enjoined would strip the process in a multitude of cases of much of its practical benefit.

I am aware that there are adjudications of tribunals of the highest character denying the authority of a court of equity, on a preliminary application, to issue an injunction, even in a restrictive form, when its obedience would require the performance of a substantive act.

Such is the case of *Andenreid v. The Philadelphia & Reading Railroad Company*, recently decided in the supreme court of Pennsylvania, to which my attention has been called by the defendants' counsel (since reported in 68 Penn. St., 370). The opinion in that case was delivered by Judge Sharswood, who is a jurist of national reputation, and anything which falls from him is justly entitled to great consideration. He states that the authorities both in England and in this country are

very clear that an interlocutory or preliminary injunction cannot be mandatory. By this he means, I suppose, that the authorities show that such an injunction cannot be mandatory in form, for he refers to the case of *Lane v. Newdigate*, 10 Ves., 193, when Lord Eldon ordered an injunction to be drawn so that, although restrictive on its face, it compelled the defendants to do certain specific things. Of that case the learned judge observes that it is not a precedent which ought to be followed in any court, and that a tribunal which finds itself unable directly to decree a thing, ought never to attempt to accomplish it by indirection.

Notwithstanding the great respect I entertain for the opinions of Judge Sharswood, and for the decisions of the supreme court of Pennsylvania, I am not prepared to assent to the view of the authorities stated in the case cited, nor to the conclusion there expressed that the cases in England ought not to be followed in any instance.

Certain it is that the jurisdiction of the court of chancery in England to decree in special cases upon motion the issue of injunctions which, though restrictive in form, may still require for their obedience the performance of substantive acts, has been uniformly maintained since the time of Thurlow. In *Robinson v. Byron*, 1 Brown's Ch. Cas., 588, a motion was made for injunction upon affidavits, stating that since April 4, 1785, the defendant who had large pieces of water in his park, supplied by a stream which flowed to the mill of the plaintiff had at one time stopped the water, and at another time let in the water in such quantities as to endanger the mill. The lord chancellor, Thurlow, ordered an injunction to restrain the defendant "from maintaining or using his shuttles, floodgates, erections and other devices, so as to prevent the water flowing to the mill in such regular quantities as it had ordinarily done before the 4th of April, 1785." The defendant was, therefore, compelled by this injunction, to remove such floodgates and other erections as he had constructed if they impeded the regular flow of the water as it had existed before the date designated.

In *Lane v. Newdigate*, 10 Ves., 192, already mentioned as referred to by Judge Sharswood, the plaintiff was assignee of lease granted by the defendant for the purpose of erecting mills and other buildings, with covenants for the supply of water from canals and reservoirs on the defendant's estates,

reserving to the defendant the right of using the water for his own collieries. The bill prayed generally that the defendant might be decreed to use and manage the waters of the canal so as not to injure the plaintiff in the occupation of his manufactory, but particularly that the defendant might be restrained from using certain locks, and thereby drawing off the water which would otherwise run to and supply the manufactory, and be decreed to restore a particular cut for carrying away the waste waters, and a certain stop-gate, and to restore the banks of the canal to their former height, and also to repair such stop-gates, bridges, canals and towing-paths as existed previous to the lease, and to remove certain locks since made. Upon motion for an injunction, the lord chancellor, Eldon, expressed a doubt whether it was according to the practice of the court to decree repairs to be done, but finally made an order restraining the defendant from impeding the plaintiff in the use and enjoyment of the demised premises and the mills erected thereon, and the privileges granted by the lease, by continuing to keep the canals, or the banks, gates, locks or works, out of repair; and from preventing such use and enjoyment by diverting the water or the use of any locks erected by the defendants, or by continuing the removal of the stop-gate, the chancellor observing at the same time that the injunction would create the necessity of restoring the stop-gate.

In *Rankin v. Huskisson*, 4 Sim., 13, the defendants were restrained, on motion, by Vice-Chancellor Shadwell from continuing the erection of stables on certain premises agreed to be laid out as an ornamental garden, adjoining a club house, and from preventing such part of the building as was already erected from remaining thereon. They were therefore compelled to remove the building already commenced.

In *Hepburn v. Lordon*, 2 Hemm. & Mill., 345, the defendants were restrained, upon motion, by Vice-Chancellor Wood from allowing inflammable damp jute deposited on premises adjoining those of the plaintiff, to remain there, and from bringing any more in such quantities as to occasion danger to the plaintiff's property.

Other cases to the same purport might be cited, but these are sufficient, I think, to show that a court of equity has jurisdiction to issue, upon an interlocutory application, an injunction which will operate to compel the defendants, in order to

obey it, to do substantive acts. It is a jurisdiction which should only be exercised in a case where irreparable injury would follow from a neglect to do the acts required. Some of the adjudged cases evince a disposition on the part of the court to restrict rather than enlarge this jurisdiction. *Blakemore v. Glamorganshire Canal Co.*, 1 Mylne & K., 154. Undoubtedly the general purpose of a temporary injunction is to preserve the property in controversy from waste or destruction or disturbance until the rights and equities of the contesting parties can be fully considered and determined. Usually this can be effected by restraining any interference with it; but in some cases the continuance of the injury, the commencement of which has induced the invocation of the authority of a court of equity, would lead to the waste and destruction of the property. It is just here where the special jurisdiction of the court is needed—to restore the property to that condition in which it existed immediately preceding the commencement of the injury, so that it may be preserved until final decree.

III. It only remains to consider whether the equities of the bill are so fully denied by the answer as to justify the dissolution of the injunction. The material allegations of the bill are that the complainant, in running certain tunnels into its mining claims, discovered and appropriated the water in controversy; and that the defendants subsequently, by means of the Nevada Tunnel, struck the water, and diverted it from the complainant. These allegations are not positively denied by the answer.

The construction of the tunnels of the complainant, and the diversion of the water by the defendants through the Nevada Tunnel, are admitted. The discovery and prior appropriation of the water by the complainant are only denied upon information and belief; and every denial which relates to the title of the water is made in a similar manner. Denials in that form may be sufficient to raise an issue for trial, but they amount, for the purposes of the motion, to no more than hearsay evidence. They will not justify the dissolution of the injunction.

“The sole ground,” says Mr. Justice Story, “upon which the defendants are entitled to a dissolution of an injunction upon an answer is that the answer in effect disproves the case made by the bill, by the very evidence extracted from the conscience of the defendant, upon the interrogation and discovery

sought by the plaintiff to establish it. But what sort of evidence can that be, which consists in the mere negation of knowledge by the party appealed to? Such negation affords no presumption against the plaintiff's claims; but merely establishes that the defendant has no personal knowledge to aid it or disprove it. It is upon this ground that it has been held, and in my judgment very properly held, that if the answer does not positively deny the material facts, or the denial is merely from information and belief, it furnishes no ground for an application to dissolve a special injunction." *Poor v. Carlton*, 3 Sumn. 78; see also, *Roberts v. Anderson*, 2 Johns. Ch., 202; *Ward v. Van Bokkelen*, 1 Paige, 100; *United States v. Parrott*, 1 McAl., 300.

The same objection applies to the allegations respecting the new matter relied upon to establish prior rights in the two Schiels, with whom the defendants claim to be in privity. Upon inspection of the answer, it appears that all which is stated in relation to the origin, working, continuance and transfer to the defendants of the claims of these parties is founded upon information and belief.

The statement does not purport to be made upon any personal knowledge possessed by the defendants, but only "according to their information and belief." Allegations resting upon this foundation furnish no ground for disturbing the injunction. For all the purposes of this motion the case stands precisely as though these allegations were omitted from the answer.

The questions suggested by the learned counsel of the defendants—whether the water exists in such state or condition as to render its diversion, under the circumstances, remediable, or anything more than *damnum absque injuria*; and whether the injunction is consistent with the policy and license of the general government to miners upon public lands—can be better considered and more justly determined on the hearing after the entire facts of the case are developed by the evidence.

Upon the case as presented, I am of opinion that the injunction should be continued until the hearing. The motion to dissolve the injunction is therefore denied.

CHAPTER XII.

CROSS-BILLS.

Rule 72.

Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

BRONSON *v.* LA CROSSE & MILWAUKEE RAILROAD COMPANY.

(2 Wallace, 283-312. 1863.)

STATEMENT OF FACTS. — This was a suit by Bronson and Soutter in the circuit court for the district of Wisconsin, to foreclose a mortgage given to secure the bonds of the company to the amount of \$1,000,000. The Milwaukee & Minnesota Railroad Company, which had previously purchased the equity of redemption of this road at a sale under a third mortgage, was made a party defendant, but made no defense. Two of the stockholders of this company, Rockwell and Fleming, asked and obtained leave to file their answers for the company, upon the ground that the president of the company declined to make any defense. The defendants, Rockwell and Fleming, who claimed under the third mortgage, alleged that the bonds secured by the prior mortgage had been conveyed to complainants without consideration; also that the foreclosure was collusive as between the railroad company and its lessee, Chamberlain, who fraudulently and collusively refused to apply the earnings of the road to the payment of interest on the bonds. Certain judgment creditors

were also made defendants, their judgments having been obtained since the execution of the mortgage.

Opinion by MR. JUSTICE NELSON.

As the two stockholders (Rockwell and Fleming), though not made defendants by the bill, were permitted, by leave of the court, to appear and put in answers in the name of the Milwaukee & Minnesota Company, it is material to inquire into the effect to be given to them. That they cannot be regarded as the answers of the corporate body is manifest, as a corporation must appear and answer to the bill, not under oath, but under its common seal. And an omission thus to appear and answer according to the rules and practice of the court, entitle the complainants to enter an order that the bill be taken *pro confesso*. A further objection to the practice of permitting a party to appear and answer in the name of the corporation is the inequality that would exist between the parties to the litigation. The corporation not being before the court, it would not be bound by any order or decree rendered against it, nor by any admissions made in the answer or stipulations that might be entered into by the parties or their counsel. It is thus apparent, that, while the name of the corporation is thus used as a real party in the litigation so far as the rights and interests of the complainants are concerned, it is an unreal and fictitious party so far as respects any obligation or responsibility on the part of the respondents.

It is insisted, however, that the directors of this company refused to appear and defend the bill filed against them, and for the fraudulent purpose of sacrificing the interests of the stockholders; and, hence, the necessity, as well as the propriety and justice, of permitting the defense by a stockholder in their name. Undoubtedly, in the case supposed, it would be a reproach to the law, and especially in a court of equity, if the stockholders were remediless. But in such a case, the court in its discretion will permit a stockholder to become a party defendant, for the purpose of protecting his own interests against unfounded or illegal claims against the company; and he will also be permitted to appear on behalf of other stockholders who may desire to join him in the defense. But this defense is independent of the company and of its directors, and the stockholder becomes a real and substantial party to the extent of his own interests and of those who may join him, and against whom any proceeding, order or decree of the

court in the cause is binding, and may be enforced. It is true, the remedy is an extreme one, and should be admitted by the court with hesitation and caution ; but it grows out of the necessity of the case and for the sake of justice, and may be the only remedy to prevent a flagrant wrong. A complainant, if he chooses, may compel a corporation to appear and answer by a writ of *distringas* ; or he may join with the corporation, a director or officer, if he desires a discovery under oath. But we are not aware of any other except a complainant who can compel an appearance or answer. Now, although the appearance and answers of the stockholders (Rockwell and Fleming) were irregularly allowed by the court, as each was permitted to appear and answer in the name of the company, yet, as the defense set up is doubtless the same as that which they would have relied on if they had been admitted simply as stockholders, we are inclined to regard the answers the same as if put in by them in that character, in the further views we shall take of the case. Each one swore to the truth of his answer in the usual way.

Before we enter upon an examination of the merits of the case, it will be proper to dispose of the cross-bill filed by Fleming against the complainant. This bill was filed in the name of the company alone, signed by their solicitors and counsel. The name of Fleming does not appear. And in addition to this, it appears that Fleming, in his petition for leave to appear and answer the bill in the name of the company, also asked leave to file a cross-bill. Leave was granted to put in the answer, but not to file the bill. The filing of it subsequently, therefore, was an irregularity for which the court below very properly afterwards set it aside. The cross-bill, so much spoken of in the argument, is thus out of the case. In this connection we may as well refer to the answers of the judgment creditors, who were made parties defendant to the bill of complaint.

Sebre Howard recovered a judgment in the United States district court, on the 28th November, 1859, against the La Crosse & Milwaukee Railroad Company, for the sum of \$16,379.86 ; and Graham & Scott, a judgment in a state court of Wisconsin, on the 25th November, 1858, against the same company for the sum of \$29,820.71 ; and another judgment in the same court on the 21st September, 1858, for the sum of \$11,181.15 ; and also a judgment against the same company

in the United States district court, on the 11th January, 1860, for the sum of \$44,413.18. This latter judgment appears from the answer, as we understand it, to have been founded on the two previous judgments in the state court. Now, it appears that each of these judgments were recovered after the date of the third mortgage of the La Crosse & Milwaukee Company, upon the foreclosure of which the Milwaukee & Minnesota Company was formed. The liens of these judgments were subsequent to this mortgage, and were cut off by its foreclosure. Indeed, the judgment of Howard, of November, 1858, and the last judgment of Graham & Scott, which was recovered in 1860, never were liens upon any interest in the road of the La Crosse & Milwaukee Company, the defendants in the judgments, as the equity of redemption had already passed to the purchaser under the sale to Barnes in the foreclosure of the third mortgage, and afterwards became vested in the Milwaukee & Minnesota Company. These judgment creditors, therefore, according to their answers, have no interest in the subject-matter of this litigation. We may add that, as replications were filed to the answers, the proof of these judgments should have been produced at the hearing. But the only proof of them that we have found in the record is in a list of judgments annexed to the report of the master. They were material, and were put in issue by the replication.

These answers of the judgment creditors being thus disposed of, the issues in the case are brought down to those raised by the answers of Rockwell and Fleming, in the name of the Milwaukee & Minnesota Company, which we have agreed to consider rather by indulgence than as matter of strict right, as the answers of the individual stockholders. And this brings us to an examination of what may be called the merits of the case.

Before we take up the questions presented by these answers to the bill which bear upon the merits, it will be proper to refer to some matters there presented, and very much discussed on the argument, which, in our judgment, should be laid entirely out of the case, as tending only to confuse and embarrass the real questions involved. We refer to those parts of the answers which relate to the dealings between the La Crosse & Milwaukee Company and Chamberlain, in which the complainants in this suit were not concerned, and with which they had no connection, as, for instance, the lease of the road

to Chamberlain, and the allegation of fraud against him and against the company in conducting the business of running the road under this lease. Also, in respect to other contracts between these parties in relation to the indebtedness of the company to Chamberlain, and to the building and completion of unfinished portions of the road, and equipping it with the rolling stock for use. These relate to the dealing of the mortgagor, the La Crosse & Milwaukee Company, with a third person, over which the complainants, as mortgagees, had no control, and for which they were not responsible. These dealings were subsequent to the execution and lien of the mortgage, and could not affect prejudicially the rights of the mortgagees. They had no interest in the earnings of the road, or concern in the appropriation of them, until the filing of the bill and the appointment of a receiver.

The only matters, therefore, set forth in these answers and in the proofs, which have any bearing on the merits, are: 1. The allegation that Chamberlain received from the La Crosse & Milwaukee Company two hundred of the bonds secured by this mortgage fraudulently and without consideration. 2. That S. R. Foster received one hundred of the bonds in the same way. 3. That J. T. Soutter, one of the trustees, received fifty-five of them, and refused to deliver them to the company. 4. That Greene C. Bronson, the other trustee, received fifteen for the stock of the company. 5. That Prentiss Dow, an officer of the company, received fourteen for less than \$1,000. And 6. That Chamberlain, who had covenanted in the lease of the road from the company, to apply the proceeds derived from the use of it to the payment of the interest accruing on the bonds, withheld the payment in pursuance of a fraudulent arrangement with the trustees, or with their agents, for the purpose of bringing about a foreclosure of the mortgage, that he might be enabled to purchase the road.

These are the allegations that bear upon the merits of the controversy, and deserve to be considered. We shall not, however, incumber this opinion with any very detailed explanation of them, but shall briefly refer to the proofs relating to each of these charges.

1. *As to Chamberlain.* It appears that he held a large claim for damages against the company, on account of their failure to fulfill contracts made with him to build the western division of the road. The work on the road was suspended

by reason of this failure. And in the fall of 1857, upon the issue of the bonds of the company, under this second mortgage, an arrangement was entered into by the company, by which he received these two hundred bonds, at fifty cents on the dollar, towards payment of this claim.

2. *As to S. R. Foster.* He had loaned the company over \$150,000 and had taken their bonds as security, and, among others, the one hundred in question. It appears that, at a meeting of the board of directors, 24th May, 1858, the matter between them was adjusted by delivery of forty land-grant bonds to Foster.

3. *As to T. J. Soutter.* The fifty-five bonds in controversy between him and the company were settled, as appears by a receipt of their chairman and vice-president, on 11th September, 1858, by the delivery of other bonds to the company.

4. *As to G. C. Bronson.* He had purchased \$15,000 of stock, one hundred and fifty shares from the company, in the spring of 1857, and paid eighty cents cash on the dollar, the president at the time agreeing that the company would repurchase it at the same rate at any time thereafter if he should wish to surrender it back. The company was doubtless pressed for money at the time. At a meeting of the board of directors on the 2d of September, 1858, it was resolved that it would take into consideration the stock theretofore purchased by Judge Bronson, as he rendered many services to the company for which he had received no compensation; and afterwards, in September of the same year, it appears that the president of the company, who had induced him to purchase the stock, received it back and delivered to him the fifteen bonds in question. The truth of the case, therefore, is, that instead of receiving from the company the money he had advanced for the stock, according to their agreement, he received in place of it only bonds of the company of less than half the value; and, as it appears, nothing for his legal advice and services.

5. *As to Prentiss Dow.* It appears that but thirteen bonds had been received by him, and for which he paid the company, at the time, \$11,400 in cash, stock and other bonds, and was afterwards engaged in its service as agent, settling claims against the company.

In this connection, it is proper to refer to the terms as published in a circular by the La Crosse & Milwaukee Company,

and under which these bonds were negotiated and put into circulation. This paper is dated August 10, 1857. The company state that the importance of completing the road this season to the junction of the western division (sixty miles from Portage), by which they would not only control the coming winter's travel of the Upper Mississippi, but receive over three hundred thousand acres of the land grants, have determined the board of directors to place before the stock and bondholders extraordinary inducements to furnish the means; that the sum of \$400,000 would be required. To obtain this sum, the company now offers the holders of its stock and of unsecured bonds, a new issue of one million of eight per cent. bonds, etc. The terms proposed are to receive in payment for a bond of \$1,000, \$400 in cash, and the like sum in the stock or unsecured bonds of the company. It was upon these terms that the directors went into the market in the city of New York and elsewhere for the purpose of negotiating the bonds which now constitute the subject of litigation.

6. *As to the charge of collusion of the complainants with Chamberlain in the proceedings to foreclose the mortgage.* This allegation is founded upon an agreement entered into with Chamberlain on the 13th of November, 1859. At the time of this agreement he was in possession of the road and in the receipt of its earnings, and the obvious object of it, on the part of the trustees, was to procure the control of the net proceeds of its earnings, pending the proceedings of foreclosure. For this purpose, Chamberlain agreed to deposit the whole of the earnings with the agent of the trustees from day to day; and the trustees, on their part, agreed to appropriate them to the objects and uses provided for in the lease, as the exigencies and proper working of the road might require. The trustees, in order to secure the fidelity of the officers and agents of Chamberlain connected with the earnings of the road and the receipts of its revenues, stipulated for a supervision and control over these persons and for the discharge of any of them from the service in case of a dereliction of duty. They provided, also, for access to the books and papers relating to the revenues, management and running of the road; also, for the appointment of a receiver in case of the non-fulfillment of the agreement on the part of Chamberlain. These provisions were very important, as the revenues of the road, according to the terms of the lease, after covering running expenses and

paying the interest on prior incumbrances, were to be applied to the discharge of the interest on these second mortgage bonds. The interest then due on them amounted to \$40,000. It was also agreed that the proceedings of foreclosure should be conducted amicably; that is, no unreasonable opposition should be made to them by Chamberlain. It was further agreed that the sale should be made, if practicable, subject to the lease of Chamberlain, and that no opposition should be made to his purchase of the road at the sale under the foreclosure; but the trustees expressly reserved the right to bid at the sale for the protection of the bondholders. The trustees also agreed that in case Chamberlain should become the purchaser, they would extend a credit of nine and twenty-four months upon so much of the interest as had become due.

It is supposed that the arrangement was entered into for the fraudulent purpose of enabling Chamberlain to purchase the road at the foreclosure sale, and thereby cut off subsequent incumbrances, and especially the rights and interests of the Milwaukee & Minnesota Company, formed under the third mortgage. But there is no evidence of this charge in the proofs, nor even of any previous dealings between the parties tending to this conclusion. They came together for the first time after the trustees had determined to foreclose the mortgage for default in the payment of interest, and finding Chamberlain in the possession of the road, and refusing to deliver it over to the trustees, as provided for in the mortgage, but, on the contrary, insisting upon his right to run the same pending the legal proceedings, it is not strange that the trustees should have endeavored to arrange with him for a supervision and control, in the mean time, over the earnings and management of the road, and that he should forbear any unreasonable opposition to the foreclosure suit. And as to the provision relating to the purchase in case of a sale, there is nothing in it interfering with any rights that belonged to the trustees, or to the prejudice of third parties, the judgment creditors, or company formed under the third mortgage. In a word, the arrangement was highly beneficial to the bondholders represented by the trustees, and prejudicial to no one concerned in the foreclosure suit.

We shall not, however, dwell longer on this branch of the case: indeed, much that we have thus far said has been rather by way of explanation, and for the purpose of clearing it of

matters and issues that do not belong to it, and have served only to confuse and embarrass its consideration. In view of this object and purpose, we have referred to the two answers of the stockholders, Rockwell and Fleming, and have endeavored to separate the irrelevant matter from that which bore upon the merits, so as to confine the examination to the latter, namely, to the charges against the validity of the bonds impeached, of the number of some three hundred and eighty, in the hands, or which passed into the hands, of several individuals named, and have shown, as we think, by a reference to the proofs, that these charges are not well founded. The general and sweeping allegations against the other portion of the bonds, without specification or identity, we have not specially noticed. These charges are too general to be entitled to consideration, and the proofs relied on are as general and indefinite as the allegations. We have also shown that the judgment creditors who appeared and answered have no interest in the matters in controversy; and, lastly, that the charges of a fraudulent collusion between the trustees and Chamberlain rest upon suspicion instead of upon proofs.

We now come to a branch of the case which presents a more conclusive answer to all the charges, whether in allegations or in proofs of the respondents, and overrides all other views that may or can be taken of them. As we have seen, this third mortgage, under which the Milwaukee & Minnesota Company was formed, was executed and delivered to Barnes, the trustee, on the 22d June, 1858, to secure the payment of an issue of \$2,000,000 in bonds, and a supplement to this mortgage was executed to the same trustee, on the 11th August following. These two mortgages, or rather one in two parts, were, in express terms, *made subject, among other incumbrances mentioned, to the bonds secured by a second mortgage on the eastern division of the road, to the amount of \$1,000,000.* Again, the bonds issued under this third mortgage, one of which is in the proofs, have an indorsement on the back, as follows: "*State of Wisconsin, La Crosse & Milwaukee Railroad Company, third mortgage sinking fund bond, seven per cent., etc.,*" subject, among other things, "*to a second mortgage on the same line of road of \$1,000,000.*"

At the time this third mortgage was executed and thus made subject to the second mortgage bonds, all these bonds had been negotiated by the company, and were in circulation

in the business community. They were all negotiated in the months of September, October, November and December, 1857. This, the company, of course, well knew at the time of the execution of the third mortgage, and knew, also, of the circumstances attending the negotiation of them. They had received and were in the enjoyment of the avails of them, and with this knowledge, and under these circumstances, the third mortgage, and the bonds issued under it, were made in express terms subject to the payment and satisfaction of the bonds issued under the second. All persons, therefore, taking these third mortgage bonds, or coming in under the mortgage, took them and came in with a full knowledge that the mortgagor had made the security subject to the prior lien and indebtedness. Even if there had been any valid objection to these bonds under the second mortgage, it was competent for the obligor to waive them, and no better proof could be furnished of the waiver than the acknowledgment of the full indebtedness, by making the subsequent security subject to it. This was a question that belonged to the obligor to determine for himself when giving the third mortgage; but, besides this, what right have those coming in under it to complain? They come in with full notice of the acknowledgment of the indebtedness and previous lien; and, especially, what right have the Milwaukee and Minnesota Company to complain, who purchased the equity of redemption through Barnes, their agent, subject to the previous incumbrances of \$1,000,000. They have the benefit of that incumbrance by an abatement of that amount in the price of the purchase.

Without pursuing the case further, we are satisfied the decree of the court below, reducing the indebtedness of the La Crosse & Milwaukee Company to the bondholders, is erroneous, and that the decision should have been for the full amount of \$1,000,000, and interest.

We shall therefore reverse the decree and remit the cause to the circuit court of the United States for the district of Wisconsin, with directions to enter a decree for all the interest due and secured by the mortgage, with costs; that the court ascertain the amount of moneys in the hands of the receiver or receivers from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest, and apply it to the same; and that if the moneys thus applied are not sufficient to discharge the interest due on the 1st day of

March, 1864, then to ascertain the balance remaining due at that date, and in case such balance is not paid within one year from the date of the order of the court ascertaining it, then an order shall be entered directing a sale of the mortgaged premises, under the direction of the court, and on bringing the proceeds into court, they shall be applied to the payment of the balance of interest; and if they exceed such balance, shall be applied to the future accruing interest down to the sale; and if they exceed that, to the principal of the bonds, in case the bondholders assent, or *pro rata* to those who may assent, and any remaining balance of the proceeds to be invested, under the direction of the court, for the payment of future accruing interest, and ultimately the principal. And further, that in case the interest upon the bonds is paid without a sale, the decree shall remain as security for subsequent accruing interest, and ultimately for the principal. And further, that the court may pay out of moneys in the hands of the receiver, or out of the proceeds, the taxed costs of the trustees in the proceedings for the foreclosure of the mortgage, not taxed and received from the defendants in those proceedings, and also such counsel fees in behalf of the trustees as to the court, in its discretion, may seem right to allow.

Decree accordingly.

PEAY v. SCHENCK.

(Circuit Court for Arkansas: 1 Woolworth, 175-191. 1868.)

Opinion by MILLER, J.

STATEMENT OF FACTS.—This is a bill in chancery brought by the complainant to quiet his title to certain real estate, as against Peay, and for partition thereof, as against Bliss. The title which he asks to have quieted and confirmed is derived from a sale for taxes levied upon the real estate mentioned in the bill, under the act of congress of 1861, and the amendatory act of 1862, passed to enforce the collection of the tax in the insurrectionary districts.

The defendant Peay files his answer and cross bill when the proceedings under which the plaintiff claims were had, in which he states that he was, and still is, the true owner of the lots in controversy; that for several reasons detailed in the answer and cross-bill, the proceedings were void and conferred no title on Bliss, the purchaser at the tax sale; and that the plaintiff, who purchased from Bliss, is therefore without title.

He makes Bliss, as well as the plaintiff, a defendant to this cross-bill, and prays that the tax sale may be declared void, and his title quieted, and the possession of the property, which had been delivered to Bliss by the tax commissioner, restored to him. He also prays for the appointment of a receiver pending the litigation, and for other relief. The plaintiff and Bliss filed a demurrer to this cross-bill, based on the proposition that the bill cannot be entertained in this court, because Peay and Bliss are both citizens of the state of Arkansas.

If this were an original bill brought by the plaintiff therein, as an independent measure of relief, it could not be sustained. Bliss was the sole purchaser, at the tax sale, of the property in dispute, and the certificates of sale are in his name, and Schenck, who alleges a right in himself to only an undivided fourth part, derived his claim by purchase from Bliss. It is clear, therefore, that as between Peay as plaintiff, and Bliss as defendant, both being citizens of Arkansas, no original and independent suit of this character can be maintained in the federal courts.

On the other hand, it is insisted that Schenck, who is a citizen of Ohio, and the plaintiff in the original bill, asks, as against Bliss, merely a partition of the premises, and that Peay has no interest in this branch of the case; that the principal relief sought by him is a decree quieting his title as against Peay; and that in this branch of the case, Bliss' interests consist with the plaintiff's, and that it thence appears that the interests of Schenck and Bliss are equally adverse to Peay's. It is also said that the matter of the cross-bill is strictly defensive, and necessary to be presented in order to bring before the court fully the defenses of the plaintiff therein to the original bill.

If this be true, the demurrer must be overruled, for it is the established doctrine of this court, that where a party defendant finds it necessary for his defense, and to prevent an injustice resulting to him from the position in which the case stands, he is at liberty to file a cross-bill, if the case is pending in chancery, or an original bill, if the case is one at law, although the parties defendant to said bill, or some of them, may be citizens of the same state with himself. The only limitations to this principal are, that the bill must be necessary to the defense of the party filing the bill, and it must be filed against parties already before the court, and subject to its jurisdiction, either as plaintiffs or defendants in the original

suit. *Dunn v. Clarke*, 8 Pet., 1; *Clarke v. Mathewson*, 12 Pet.; 164; *Cross v. De Valle*, 1 Wall., 1.

And in determining whether a bill is original and independent, or is ancillary and auxiliary to a matter already before the court, we are not confined to the line which, in chancery pleadings, divides original bills from cross-bills and supplemental bills, but may look to the essence of the matter, and to principles which, as regards parties, the federal courts have adopted in reference to their jurisdiction. *Minnesota Co. v. St. Paul Co.*, 2 Wall., 632; *Freeman v. Howe*, 24 How., 450.

The main question raised by the original bill is the validity of the title conferred by the tax sale, and the relief sought is to have that title quieted and confirmed. The cross-bill refers only to matters connected with the validity of the same tax title, and prays, as its sole relief, to have it set aside and declared void. In reference to the partition, the cross-bill is silent, and the relief asked concerning a receiver is purely incidental to the progress of the suit, and could be had without the aid of the cross-bill on mere petition. It seems to us, therefore, that the cross-bill is essentially a mode of defense appropriate to the case; that it is necessary to a complete determination of the controversy brought before the court by the original bill; that it is ancillary to the main cause; and that, as it brings no new parties before the court, it is not liable to the objection taken by the demurrer. The demurrer is therefore overruled.

[NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

CHAPTER XIII.

REHEARINGS AND BILLS OF REVIEW.

Rule 88.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No hearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

DEXTER *v.* ARNOLD.

(Circuit Court for Rhode Island: 5 Mason, 303-332. 1829.)

STATEMENT OF FACTS.—Hearing of a petition to file a bill for the purpose of having a review of a decree rendered at a former term of the court. The petitioner, in whose favor the previous decree had been rendered against Thomas Arnold, the husband of the present defendant, for an accounting, and under which he had been paid \$500.66, claimed that since that time new facts had been discovered, showing that several sums of money had come into the hands of Thomas Arnold, not accounted for by the master, and that several claims had been allowed in favor of said Arnold by the master, which, in the light of this subsequent evidence, should not have been allowed.

Opinion by STORY, J.

The present is a somewhat novel proceeding in this circuit; and I am not aware that, in any other circuit of the United States, any general course of practice has prevailed which

would supersede the necessity of acting upon this, as a case of first impression, to be decided upon the general principles of courts of equity.

It comes before the court upon a petition for leave to file a bill of review of a decree rendered in this court at November term, 1823, principally upon the ground of a discovery of new matters of fact. The petition was filed at November term, 1827, and affidavits have been read in support of it. Counter-affidavits have also been admitted on the other side, not for the purpose of investigating or absolutely deciding upon the truth of the statements in the petition, but to present, in a more exact shape, some of the circumstances growing out of the original proceedings, which may assist the court in the preliminary discussion, whether leave ought to be granted to file the bill of review.

This course, though not very common, is, as I conceive, perfectly within the range of the authority of the court (see *Livingston v. Hubbs*, 3 Johns. Ch., 124; *Norris v. Le Neve*, 3 Atk., 25); and may be indispensable for a just exercise of its functions in granting or withholding the review. If, indeed, it were doubtful, in case the bill of review should be allowed, whether the defendants could by plea or answer traverse the allegation in such bill that the matter of fact is new, I should not hesitate to inquire, in the most ample manner, into the truth of such allegation, before the bill was granted, in order to prevent gross injustice. But as every such bill of review must contain an allegation that the matter of fact is new, it seems to me clear upon principle, that, as it is vital to the relief, it is traversable by plea or answer, and must be proved if not admitted at the hearing. In *Hanbury v. Stevens* (1784), cited by Lord Redesdale (*Redesd. Pl. Eq.*, 80), [3d ed., 70], the court is reported to have held that doctrine. The case of *Lewellen v. Mackworth*, 2 Atk., 40; *Barnard*, Ch., 445, though very imperfectly, and, as I should think, inaccurately, reported, seems to me to support the same conclusion. It has been relied upon by the best text-writers for that purpose. *Redesd. Pl. Eq.*, 231 (3d ed.); *Coop. Eq. Pl.*, 305; *Montague, Eq. Pl.*, 335, note; *id.*, 336; 2 *Montague, Eq. Pl.*, 227, note 100. Lord Redesdale, in his original work on Equity Pleadings (*Redesd. Eq. Pl.*, 80, 2d ed.), stated the point as one which may be doubted; but upon principle I cannot see how that can well be. And in the last edition (the third), revised

by his lordship, I find that he has questioned the propriety of such a doubt. Redesd. Pl. Eq., 70 (3d ed.).

Before I proceed to consider the particular grounds of the present petition, it may be well to glance at some of the regulations which govern courts of equity in relation to bills of review, that we may be better enabled to judge of their application to the courts of the United States. The ordinance of Lord Bacon constitutes the foundation of the system and has never been departed from. It is as follows: "No decree shall be reversed, altered or explained, *being once under the great seal*, but upon a bill of review. And no bill of review shall be admitted except it contain either error in law, *appearing in the body of the decree*, without farther examination of matters of fact or some *new matter* which hath arisen after the decree, and *not any new proof which might have been used when the decree was made*. Nevertheless, upon *new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed*, a bill of review may be grounded by the *special license* of the court and not otherwise." Beame's Orders in Chancery, 1.

A bill of review, therefore, lies only when the decree has been enrolled under the great seal in chancery. If it has not been so enrolled, then for error of law apparent upon the decree the remedy is by a petition for a rehearing. *Perry v. Phelps*, 17 Ves., 173, 178. But if the ground of the bill is new matter, discovered since the decree, then the remedy is by a supplemental bill in the nature of a bill of review, and a petition for a rehearing, which are allowed by special license of the court. Redsd. Eq. Pl. 65, [78], 81; Coop. Eq. Pl. 88, 89, 90, 91; Beame's Orders in Chan., 2 and 3, notes; *Sheffield v. Duchess of Buckingham*, 1 West., 682; Montag. Pl. Eq., ch. 12, p. 330; *Norris v. Le Neve*, 3 Atk., 26; *Perry v. Phelps*, 17 Ves., 173; *Blake v. Foster*, 2 B. & Beatty, 457, 460. This distinction between a bill of review and a bill in the nature of a bill of review, though important in England, is not felt in the practice of the courts of the United States, and perhaps rarely in any of the state courts of equity in the Union. I take it to be clear that in the courts of the United States all decrees as well as judgments are matters of record, and are deemed to be enrolled as of the term in which they are passed. So that the appropriate remedy is by a bill of review.

In regard to errors of law, apparent upon the face of the

decree, the established doctrine is that you cannot look into the evidence in the case in order to show the decree to be erroneous in its statement of the facts. That is the proper office of the court upon an appeal. But taking the facts to be as they are stated to be on the face of the decree, you must show that the court have erred in point of law. *Mellish v. Williams*, 1 Vern., 166; *Cranborne v. Delahay*, 2 Freem., 169; *Combs v. Prowd*, 1 Ch. Cas., 54; S. C., 2 Freem., 181; 3 Rep. Ch., 18; *Hard*, 174; *Perry v. Phelps*, 17 Ves., 173; *O'Brien v. Conner*, 2 B. & Beatt., 146, 154. If, therefore, the the decree do not contain a statement of the material facts on which the decree proceeds, it is plain that there can be no relief by a bill of review, but only by an appeal to some superior tribunal. It is on this account that in England decrees are usually drawn up with a special statement of, or reference to, the material grounds of fact for the decree. *Combs v. Prowd*, 1 Ch. Cas., 54; *Brend v. Brend*, 1 Vern., 214; S. C., 2 Ch. Cas., 161; *Bonham v. Newcomb*, 1 Vern., 216; *O'Brien v. Conner*, 2 B. & Beatt., 146, 154. In the courts of the United States the decrees are usually general. In England the decree embodies the substance of the bill, pleadings and answers; in the courts of the United States the decree usually contains a mere reference to the antecedent proceedings without embodying them. But for the purpose of examining all errors of law, the bill, answers and other proceedings are, in our practice, as much a part of the record before the court as the decree itself; for it is only by a comparison with the former that the correctness of the latter can be ascertained.

In regard to new matter there are several considerations deserving attention. In the first place the new matter must be relevant and material, and such as, if known, might probably have produced a different determination. *Bennett v. Lee*, 2 Atk., 529; *O'Brien v. Conner*, 2 B. & Beatt., 155; *Portsmouth v. Effingham*, 1 Ves., 429. In other words, it must be new matter to prove what was before in issue, and not to prove a title not before in issue (*Coop. Eq. Pl.*, 91; *Patterson v. Slaughter*, Amb., 292; *Young v. Keighley*, 16 Ves., 348; *Blake v. Foster*, 2 B. & Beatt., 457, 462); not to make a new case, but to establish the old one. In the next place the new matter must have come to the knowledge of the party since the period in which it could have been used in the cause at the original hearing. Lord Bacon's ordinance says

in one part it must be "after the decree;" but that seems corrected by the subsequent words, "and could not possibly have been used at the time when the decree passed," which point to the period of publication. Lord Hartwicke is reported to have said that the words of Lord Bacon are dark; but that the construction has been that the new matter must have come to the knowledge of the party *after publication passed*. *Patterson v. Slaughter*, Amb., 293. The same doctrine was held in *Norris v. Le Neve*, 3 Atk., 25, 34, and has been constantly adhered to since. A qualification of the rule quite as important and instructive is that the matter must not only be new, but that it must be such as that the party, by the use of reasonable diligence, could not have known; for if there be any laches or negligence in this respect that destroys the title to the relief. That doctrine was expounded and adhered to by Lord Eldon in *Young v. Keighley*, 16 Ves., 318, and was acted upon by Lord Manners in *Barrington v. O'Brien*, 2 B. & Beatt., 140, and *Blake v. Foster*, 2 B. & Beatt., 157, 161. It was fully recognized by Mr. Chancellor Kent, and received the sanction of his high authority in *Wiser v. Blachly*, 2 Johns. Ch., 488, and *Barrow v. Rhinelanders*, 3 Johns. Ch., 120. And in the very recent case of *Bingham v. Dawson*, 3 Jac. & Walk., 243, Lord Eldon infused into it additional vigor.

Upon another point, perhaps there is not a uniformity of opinion in the authorities. I allude to the distinction taken in an anonymous case in 2 Freeman, 31, where the chancellor said that, "where a matter of fact was particularly in issue before the former hearing, though you have *new proof* of that matter, upon that you shall never have a bill of review. But where a *new fact* is alleged that was not at a former hearing, there may be a ground for a bill of review." Now, assuming that under certain circumstances new matter not evidence, that is, not in issue, in the original cause, but clearly demonstrating error in the decree, may support a bill of review, if it is the only mode of obtaining relief (see *Norris v. Le Neve*, 3 Atk., 33, 35; *Roberts v. Kingsley*, 1 Ves., 238; *Earl of Portsmouth v. Lord Effingham*, 1 Ves., 429; *Redesdale*, Eq. Pl., 67, etc. (last edition); 1 Montag. Pl. Eq., 332, 333; *Wilson v. Webb*, 2 Cox. 3; *Standish v. Radley*, 2 Atk., 177. See also, Lord Redesdale's Observations in his third edition of his Equity Pleadings, p. 67), still it must be admitted that the general rule is that the new matter must be such as is rele-

vant to the original case in issue. Lord Hardwicke, in *Norris v. Le Neve*, 3 Atk., 33, 35, is reported to have admitted that a bill of review might be founded upon new matter not at all in issue in the former cause, which seems contrary to his opinion in *Patterson v. Slaughter*, Amb., 293 (see also, *Young v. Keighley*, 16 Ves., 348, 354; *Blake v. Foster*, 2 B. & Beatt., 457, 462), or upon matter which was in issue, but discovered since the hearing. But the very point in *2 Freeman*, 31, if I rightly understand it, is that a newly-discovered fact is ground for a bill; but not newly-discovered evidence in proof of any fact already in issue. This seems to me at variance with Lord Bacon's ordinance, for it is said that there may be a review upon "new matter, which hath arisen in time after the decree," and, also, "upon *new proof* that has come to light after the decree made, and could not possibly have been used at the time when the decree passed." It is also contrary to what Lord Hardwicke held in the cases cited from 3 Atk., 33, and Amb., 293. Lord Eldon, in *Young v. Keighley*, 16 Ves., 348, 350, said: "The ground (of a bill of review) is error apparent on the face of the decree, or new *evidence* of a fact materially pressing upon the decree, and discovered at least after publication in the cause. If the fact had been known before publication, though some contradiction appears in the cases, there is no authority that *new evidence* would not be sufficient ground." That was also the opinion of Lord Manners in *Blake v. Foster*, 2 B. & Beatt., 457. Mr. Chancellor Kent, in *Livingston v. Hubbs*, 3 Johns. Ch., 124, adopted the like conclusion; and he seemed to think that such new evidence must not be a mere accumulation of witnesses to the same fact, but some stringent written evidence or newly-discovered papers. Gilbert, in his *Forum Romanum*, chapter 10, page 186, leans to the same limitation, for he says that in bills of review "they can examine to nothing that was in the original cause, unless it be matter happening subsequent which was not before in issue, or upon matter of record or writing not known before, for if the court should give them leave to enter *into proofs* upon the same points that were in issue, that would be under the same mischief as the examination of witnesses after publication, and an inlet into manifest perjury." See, also, *Barton*, Eq., 216; *Tovers v. Young*, Prec. Ch., 193; *Taylor v. Sharp*, 3 P. Will., 371; *Standish v. Radley*, 2 Atk., 177; *Chambers v. Greenhill*, 2 Chan., 66; *Thomas v. Harvie's*

Heirs, 10 Wheat., 146. There is much good sense in such a distinction operating upon the discretion of the court in refusing a bill of review, and I should be glad to know that it has always been adhered to. It is certain that cumulative evidence has been admitted, and even written evidence, to contradict the testimony of a witness. That was the case of Attorney-General *v. Turner*, Amb., 587. Willan *v. Willan*, 16 Ves., 72, 88, supposes that new testimony of witnesses may be admissible. If it be admissible (upon which I am not called to decide), it ought to be received with extreme caution, and only when it is of such nature as ought to be decisive proof. There is so much of just reasoning in the opinion of the court appeals of Kentucky on this subject that I should hesitate long before I should act against it. See *Respass v. McClanahan*, Hardin (Ky.), 342; *Head v. Head*, 3 Marsh. (Ky.), 121; *Randolph v. Randolph*, 1 H. & M., 180.

In the next place it is most material to state that the granting of such a bill of review is not a matter of right, but of sound discretion in the court. *Sheffield v. Duchess of Buckingham*, 1 West., 682; *Norris v. Le Neve*, 3 Atk., 33; *Gould v. Tancred*, 2 Atk., 533. It may be refused, therefore, although the facts, if admitted, would change the decree where the court, looking to all the circumstances, deems it productive of mischief to innocent parties, or for any other cause unadvisable. *Bennet v. Lee*, 2 Atk., 528; *Wilson v. Webb*, 2 Cox, 3; and *Young v. Keighley*, 16 Ves., 318, are strong exemplifications of the principle.

These are the principal considerations which appear to me useful to be brought into view upon the present occasion. Let us now advert to the grounds upon which the petition is framed and see how far any are applicable to them.

The original bill was brought against Thomas Arnold (whose administrator is now before the court), for an account and settlement of his brother Jonathan Arnold's estate, upon which he had administered. The case is reported in the third volume of Mr. Mason's Reports, page 284, and I refer to that for a summary of the proceedings and final decree.

In preferring the present petition the proper course of proceeding has been entirely mistaken. The present counsel for the petitioner is not responsible for those proceedings, they having taken place before he came into the cause. A petition for leave to file a bill of review for newly-discovered matters

should contain in itself an abstract of the former proceedings, the bill, answers, decree, etc., and should then specifically state what the newly-discovered matter is and when it first came to the party's knowledge, and how it bears on the decree, that the court may see its relevancy and the propriety of allowing it. Coop. Eq. Pl., 92. The present petition, in its original form, contained nothing of this sort, but referred to an accompanying bill of review as the one which it asked leave to file, and then simply affirmed the facts stated in it to be true. This was sufficiently irregular. But upon looking into this bill of review the grounds of error are stated in a very loose manner, and in so general a form as to be quite inadmissible.

The first error assigned is in matter of law, and it is that Thomas Arnold, the administrator, ought to have been charged with interest upon all sums of money which he had received as administrator, because the said sums were used by him. The master, in his report, had declined to allow interest; and, upon an exception taken, the court confirmed his report on this point. I see no reason for changing the decree on this point, for the reasons stated in the cause in 3 Mason, 288, 290; and there is no pretense to say that there is any such proof of the use of the money in the report of the master as justifies a different conclusion. There is no error in this respect apparent on the face of the master's report or the decree. The allowance or disallowance of interest rests very much upon circumstances, and slight errors in this respect are not always held fatal. See *Gould v. Tancred*, 2 Atk., 533. There is no error apparent, therefore, on which a review ought to be granted. The next ground assigned is that Thomas Arnold did receive large sums of money and other property, which he has not accounted for before the master, and for which he ought to account; and that since the decree the petitioner hath discovered new and further evidence in relation thereto, which would have materially changed the report of the master and the decree. The petition does not state what the new evidence is, nor when discovered, and it is quite too vague for any order of the court. The bill then proceeds, very irregularly, to require, that the administrator of Thomas Arnold should answer certain interrogatories as to the cargoes of the ship *Friendship*. It then states that Thomas Arnold received six shares in the Tennessee Land Company, and that he received

\$8,000 on a policy of insurance on the brig *Friendship*, and that he received large consignments of property from Vincent Gray in Cuba in bills of exchange, &c., belonging to Jonathan's estate; and finally, that he received divers other large sums of money as agent of Jonathan. Now it must be manifest that upon allegations so general and distinct no bill of review would lie. Here is no assertion of newly-discovered evidence to maintain one. Such a bill, so framed, ought never to be allowed by a court acting upon the correct principles of chancery jurisdiction.

Afterwards an amendment of this bill to review was filed, containing more distinct specifications of new matter, most of which, however, as I shall have occasion to notice hereafter, are open to the same objections as those already stated.

But the radical objection to both bills is that they are improperly introduced into the cause at all. A bill of review can only be filed after it is allowed by the court, and upon the very grounds allowed by the court. The preliminary application by petition to file it should state the new matter shortly, distinctly and exactly, so that the court may see how it presses on the original cause; and it is not permissible to load it with charges and allegations as in an original seeking bill in equity. In the sense of a court of chancery there is not before this court any sufficient petition upon which it can act.

But as the proceeding is a novelty in this circuit, much indulgence ought to be allowed to the original counsel in the cause (for the present counsel is not at all chargeable) for irregularities of this nature upon the first presentation of the practice. I advert to the posture of the cause, therefore, not so much with an intention to subject it to close criticism, as for the purpose of declaring that, even if I could gather from the papers that there is matter upon which a bill of review would lie, it is not before the court in such a shape that the court could judicially pass an order of allowance.

The case has, however, been argued, and with great ability, upon its merits; and waiving for the present any further reference to the form of the proceedings, I will proceed to the consideration of the points made at the bar.

The first point is one made by the defendant, and, being preliminary in its nature, must be disposed of before the plaintiff can be further heard. It is said to be a rule in equity,

that, where a party has less decreed to him than he thinks himself entitled to, he cannot bring a bill of review; for that lies only in favor of a party against whom there is a decree. For this is the opinion of elementary writers (2 Madd. Pr., 412; 1 Harris. Pr., 86), and the case of *Glover v. Partington*, 2 Freem., 183; S. C., 2 Eq. Abrid., 174, is cited. The case, as here reported, certainly supports the doctrine. But it appear to me that, if the doctrine is correct, it is so only in cases where there is no error apparent on the face of the decree, and no newly-discovered matter to support a bill of review, for then the proper remedy is by appeal. If there is no such remedy by appeal, but only by bill of review, it would be strange if a material error could not be redressed upon such a bill by the party to whom it had been injurious; that if a man had \$10,000 due him, and had a decree for \$100, he was conclusively bound by an error of the court. The decision, reported in 2 Freeman, 182, was made by the master of the rolls, who allowed the demurrer; but from the report of the same case in 1 Ch. Cas., 51, it appears that it was afterwards reheard before the Lord Chancellor and Baron Rainsford, and the demurrer was overruled. See S. C., cited Com. Dig., Chancery, G, to the same effect. So that the final decision was against the doctrine for which it is now cited. And Lord Nottingham, a few years afterwards, in *Vandebende v. Levinston*, 3 Swanst., 625, resolved that the plaintiff may have a bill of review to review a decree made for himself, if it be less beneficial to him than in truth it ought to have been. We may then dismiss this objection.

We may now advance to the examination of the points made by the petitioner in support of his petition for a review, assuming that the amended bill of review is to be received, *pro hac vice*, as such a petition. I have already stated that it is utterly defective in the essential ingredients of such a petition, in not stating with exactness the nature of the new evidence, and when it was first discovered. It is not sufficient to say that the petitioner expects to prove error in this or that respect; or that he has discovered evidence which he hopes will establish this or that fact. But he must state the exact nature and form of the evidence itself, and when discovered. If written evidence, it must be stated, and its direct bearing shown. If of witnesses, what facts the witnesses will prove, and when the party first knew the nature of their testimony.

It is impossible otherwise for the court to judge whether evidence is decisive or is merely presumptive or cumulative; whether it goes vitally to the case, and disproves it, or only lets in some new matter, confirmatory or explanatory of the transactions in the former decree. The party must go further, and establish that he could not, by reasonable diligence before the decree, have procured the evidence. Now, in every one of these particulars, the amended bill, *quasi* a petition, is extremely deficient. I have looked it over carefully, and cannot find that it points out a single written paper which disproves the original case, or names a single witness whose testimony, if admitted, would overturn it. It deals altogether in general allegations that certain things are expected to be proved; and, like an original bill, proceeds to ask a discovery from the defendant of letters and papers in her possession as administrator, relative thereto. There are indeed, in the accompanying affidavits, some papers produced and relied on; but they cannot supply the defects of the original petition.

The remainder of the case, being merely a discussion of facts, is omitted.

Petition dismissed.

SCOTT v. HORE.

(Circuit Court for Virginia: 1 Hughes, 163-168. 1875.)

Motion for rehearing on the ground of the negligence of defendant's counsel.

Opinion by HUGHES, J.

I am to decide whether this motion for a rehearing of the cause can be granted, and whether the decree of this court, entered on the 9th of April, 1874, can be set aside on such motion. I think it is now settled law in Virginia, notwithstanding the remarks of the court in 9 Leigh, 289, on the case of *Patterson v. Campbell*, never reported, that a judgment or decree rendered by default cannot be opened on the ground of the negligence of counsel. In *Hill v. Bowyer*, 18 Gratt., 382-6, the court of appeals says: "A defendant upon whom process has been served, who wholly neglects his defense, or contents himself with employing a lawyer who practices in the court to defend him without giving any information about his defense, or inquiring whether he is attending to the case, is not entitled to relief on the ground of surprise, however grossly unjust the decree may be." For other decisions of the court on this point see 9 Leigh, 478; 10 Gratt., 506; 22 Gratt., 136; and

Wallace v. Richmond, assignee to be reported in 25 Gratt. It is also to be gathered from these cases that the proceeding proper to be employed in applications for opening judgments or decrees taken on default through negligence of counsel is not that by a motion for rehearing, but by bill in chancery. Under the Virginia law, this application by motion cannot be sustained at all; and the decisions are against it though made by bill.

If this motion depended alone upon the law as settled in Virginia for the courts of the state, I should feel bound to deny it on the grounds: 1st. That negligence of counsel is in Virginia no ground for opening a judgment or decree; and, 2nd, that even though in extreme cases it be so, yet the proper mode of proceeding for defendant is by bill of injunction, and not by motion.

But behind these reasons, which forbid a rehearing of this case, on motion, there is another objection more insurmountable than the rest. The eighty-eighth rule of the supreme court of the United States, prescribed for proceedings in chancery in the inferior courts, forbids the rehearing of a cause after the term at which the final decree of the court shall have been entered and rendered, if an appeal lies to the supreme court. The spring term and the fall term for 1874 of this court had both passed before this motion was entered. The general decisions of the court of England and the states of America, many of which have been cited in argument, can have no force in this court in opposition to such rule. We are bound here by the rule 88. The very fact of their having been a diversity of rulings on this subject by other courts was probably the inducement which led the supreme court to lay down its rule 88. That rule is the law here, whatever may be the rulings of the other courts of the highest authority on this subject. The supreme court has not only laid down its rule 88, but in the cases of *Cameron v. McRoberts*, 3 Wheat., 591, and *McMicken v. Perin*, 18 How., 507, has construed that rule and decided that circuit courts have no power to set aside their decrees in equity, on motion, after the term at which they are rendered.

If the decree of the 9th of April, 1874, was a final decree, and an appeal lies from it to the supreme court, then I am not at liberty to grant a rehearing. If it is a final decree, then an appeal does lie to the supreme court, because the amount

involved exceeds \$2,000, the sum then requisite to give jurisdiction of an appeal to that court. The only inquiry, therefore, is whether the decree in question was a final decree.

It has been truly said in argument that there are two classes of decisions by appellate courts with reference to this character of finality in decrees: 1st, those in which it is necessary to determine whether an appeal lies; and, 2d, those in which a limitation of time for an appeal cuts off the right. In the first class of cases the courts go farther to construe a decree as final than they do in the last class of cases; in each class aiming to preserve to the suitor this valuable right. A court will when no limitation of time occurs, strain a point to treat a decree as final from which an appeal has been taken; and in the other case it will strain a point to treat a decree as not final where an appeal would be cut off by limitation. Hence has arisen a diversity of decisions on this question, all made in the interest of the suitor's right of appeal. I admit the difficulty of defining a final decree in such precise terms as will hold good in all cases. I have been in the habit of thinking those decrees to be final which determine all the principles of law and equity arising in a case, and which give direction for carrying the principles so decided into execution. If decrees which are made after all evidence is taken, and full and final argument heard, and which determine all questions raised, do not go on to provide for carrying into complete execution the principles decided, they are in that respect defective. They are final decrees, though as such they may be defective in their ministerial parts. The supreme court of the United States has not unfrequently complained of district and circuit courts for not entering complete final decrees, and of their carrying into execution by piecemeal decisions which finally settle all questions arising in causes. The difficulty of defining what are final decrees has arisen chiefly from the fact that decrees really final in character have been defective in providing fully for the ministerial measures to be taken by officers of the court in carrying them into execution. Of course it would be exceedingly empirical to hold that a *final* decree is the order entered *last* in point of time in a cause. A final decree is one which finally adjudicates the questions of right and of law involved in a cause, and proceeds to provide with reasonable completeness for the execution of such measures as may be necessary and proper for placing successful suitors in possession of the rights decreed to them.

The decree now under consideration is final, and in my judgment, not only in its express terms, but in its subject-matter. Being a final decree, and one from which an appeal may be taken to the supreme court, it cannot be opened now on a motion for rehearing. The only possible method by which it can be re-examined in this court is upon bill of review. If such a bill is not brought, there is no way of staying the execution of it other than by appeal. The motion of the defendant is denied.

ROEMER *v.* SIMON.

(8 Otto, 149, 150. 1875.)

APPEAL from U. S. Circuit Court, District of New Jersey.

Opinion by WAITE, C. J.

It is clear that after an appeal in equity to this court we cannot, upon motion, set aside a decree of the court below and grant a rehearing. We can only affirm, reverse or modify the decree appealed from, and that upon the hearing of the cause. No new evidence can be received here. R. S., § 698. The court below cannot grant a rehearing after the term at which the final decree was rendered. Equity rule 88.

It would be useless to remand this cause, therefore, as the term at which the decree was rendered has passed. If the term still continued, the proper practice would be to make application to the court below for a rehearing, and have that court send to us a request for a return of the record in order that it might proceed further with the cause. Should such a request be made, we might, in a proper case and under proper restrictions, make the necessary order; but we cannot make such an order on the application of the parties. The court below can alone make the request of us. The application of parties must be addressed to that court and not to us.

Motion denied.

CHAPTER XIV.

APPEALS.

Rule 93.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

POULTNEY *v.* CITY OF LAFAYETTE.

(3 Howard, 81-87. 1844.)

Opinion by MR. JUSTICE MCLEAN.

STATEMENT OF FACTS.—This is an appeal from the decree of the circuit court for the eastern district of Louisiana. To determine the point brought up by the appeal, it is necessary to state the substance of the bill or answers. On motion, the circuit court dismissed the bill, under the twenty-first rule, because the “complainants had not set down for hearing the pleas filed in this case, nor filed replication to the answers, although more than two terms of the court had elapsed since filing of the same.”

The rule referred to is: “If the plaintiff shall not reply to, or set for hearing any plea or demurrer before the second term of the court after filing the same, the bill may be dismissed, with costs.” No plea had been filed in the case, and the demurrer filed had been overruled, so that the rule did not apply to the case as it stood at the time of the dismissal. The rule can only apply to demurrers and pleas technically so called. And there is no other rule of proceeding which authorized the decree of the court. The complainant may, if

he choose, go to the hearing on the bill and answer. The decree of the circuit court is reversed, and the cause is remanded for further proceedings.

CLEMENTS *v.* MOORE.

(6 Wallace, 299-316. 1867.)

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—These are cross-appeals, in equity, from the district court of the United States for the western district of Texas.

The appellants, Clements and Sheldon, are judgment creditors of the defendant, James Nicholson, and filed the original and amended bills, found in the record, to set aside, upon the ground of fraud, the sale by Nicholson to the defendant, Moore, of Nicholson's entire stock of merchandise, and the conveyance by Nicholson to Moore, and by Moore to Rebecca H. Nicholson, James Nicholson's wife, of certain lots in the town of Bastrop—described in the proceedings. The district court adjudged the sale of the merchandise to be fraudulent and void; and dismissed the bill as to Mrs. Nicholson and the lots.

We are met at the threshold of the investigation by the objections that leave was not given to file the amended bills, and that there is no replication in the case. Hence it is insisted that our examination is to be confined to the original bill and answer, and that we cannot look beyond them. We find in the record a sufficient replication, though it was not filed until after a part of the testimony had been taken. But if there were none, there are two sufficient answers to both of the objections. They were not made in the court below. They were thereby waived, and cannot be taken here. They are also within the provisions of the statute of 1789, upon the subjects of jeofails. Brightley's Digest, 41.

The goods were sold on the 7th of July, 1851. After satisfying a debt due to House out of the stock, Nicholson determined, under the advice of Larkins, to assign the residue to Moore for the benefit of his creditors. Moore was applied to accordingly. He was told by Nicholson that his object was to secure his creditors, and that unless the assignment was made his entire means would be absorbed by a few of his creditors in New York, to whom he was most largely indebted, to the

exclusion of his home and other debts. Moore promised to consider the subject. An assignment was subsequently drawn. Before it was executed Moore made the purchase. The terms were the cost in New York, less twenty per cent. The goods amounted to \$6,310.35. Moore gave his notes, amounting in the aggregate to that sum. At what times they were payable respectively, and whether they bore interest, does not appear in the case. The laws of Texas permitted a failing debtor to prefer creditors according to his election. We find here none of the badges of fraud mentioned in *Twyne's* case. The sale was openly made; there was an immediate change of possession; the price agreed to be paid was fully as much as the goods were worth. Moore lost upon them. All the notes given by Moore, except three for \$500 each, were applied in payment of Nicholson's debts. On the other hand, Nicholson was insolvent, and Moore knew it. He knew also that it was Nicholson's purpose to hinder and delay the complainants. It was easy to convert the notes and place the proceeds beyond the reach of his creditors. The same process as to the goods was more difficult. If Nicholson intended a fraud, Moore must have known he was giving him facilities in that direction. One of the three notes mentioned was sold by Nicholson at a large discount. The other two were delivered by Mrs. Nicholson to Moore in payment for the lots in controversy. It remains to consider the law applicable to this state of facts.

The complainants waived an answer, under oath, by this defendant. Her answer is nevertheless verified by an affidavit. This was proper. It was her right so to answer and the complainants could not deprive her of it. Such is the settled rule of equity practice where there is no regulation to the contrary. *Armstrong v. Scott*, 3 Greene, 433. The decree of the district court of Bastrop county is found in the record. It was entered by the agreement of counsel. It required Moore to execute to Mrs. Nicholson a full and complete title to lots 62, 65 and 70. It is silent as to block 95, and ordered lot 4 to be sold to satisfy the claim of Scott, a defendant in that proceeding. Neither party took any testimony touching this part of the case. It stands upon the bills and answers.

No attempt is made to explain the contradiction of the answers of Moore and Nicholson by the deeds as to the amount of the consideration alleged to have been paid by

Moore for the lots. The answers of both are silent as to the mode of payment. This rendered disproof of the allegation of the amount difficult if not impossible. The facts disclosed create a strong doubt of the integrity of the transaction between Moore and Nicholson and throw on Moore the duty of making a full explanation and the burden of proof to sustain it. *Piddock v. Brown*, 3 P. Will., 289; *Wharton v. May*, 5 Ves., 49. We feel constrained to resolve the doubt against the validity of the sale. The striking discrepancies between the answers of Mr. and Mrs. Nicholson need no remark. She admits that she paid for the lots by delivering up to Moore notes which he had executed to Nicholson. This makes a *prima facie* case against her. She adds that the notes were transferred to her by Nicholson in consideration of money she had lent to him. Of this there is no proof. It is an established rule of evidence in equity that where an answer which is put in issue admits a fact and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved; otherwise the admission stands as if the fact in avoidance had not been averred. *Gresley's Evidence*, 13; *Hart v. Tenyke*, 2 Johns. Ch., 60. The application here of this principle is decisive. There is nothing to neutralize the effect of the admitted fact that the property was paid for with notes which had belonged to Nicholson. There is not the slightest proof of any consideration for the transfer of those notes by him to her. The complainants have a right to follow the fund into any property in which it was invested as far as it can be traced. *Oliver v. Piatt*, 3 How., 401. The decree of the court below is silent as to lots 4 and 95. There is no competent proof in the record sufficient to exempt them from the claim of the complainants. If others have acquired paramount rights it must be shown elsewhere in another proceeding.

The decree as to both branches of the case is, in our judgment, erroneous. It is therefore reversed. The case will be remanded to the district court with instructions to enter a decree in conformity with this opinion.

[NOTE.—Only so much of this case is reported as relates to Equity Pleading and Practice.]

WARD v. ARREDONDO.

(Circuit Court for New York : 1 Paige, 110-116. 1825.)

Opinion by THOMPSON, J.

STATEMENT OF FACTS.—This is a motion that the appearance of Fernando Arredondo, one of the defendants, be entered in this court, for the purpose of removing the cause from the state court, where it was commenced, pursuant to the acts of congress in such case made and provided. A brief statement of the situation of the cause is necessary to a right understanding of the questions that are presented for consideration.

A bill in equity was filed by Ward, a citizen of the state of New York, against the Arredondos, who are aliens, and Thomas, who is a citizen of the state of New York, for the specific performance of a contract between the Arredondos and Ward, for the conveyance by them of a certain tract of land in Florida, under and by virtue of a contract which had been entered into between the parties for the sale and purchase of the land in question, a deed for which had been duly executed by the Arredondos, and sent to Thomas for delivery, with certain instructions which will be noticed hereafter. The main object of the bill was to compel a delivery of the deed to Ward, and to restrain Thomas from returning the same to the Arredondos, until the merits of the suit between them and Ward should be determined. Thomas appeared in the state court, and answered the bill.

One of the Arredondos has heretofore appeared in the state court, and petitioned for a removal of the cause into this court, and his appearance has been duly entered here. We lay out of view the objection urged on the argument, that the cause was not in the state circuit court when his appearance was entered and the petition to remove the cause into this court was filed. It is alleged that the cause had been removed from that court into the court of chancery by appeal, and had not been remitted to the state circuit court, at the time the appearance was entered. We assume, for the purpose of the present motion, that the cause was regularly in the state circuit court, and that the appearance of one of the Arredondos was duly entered there.

Under this state of the case the questions presented for consideration are : 1st. Whether, as Ward, the complainant, and Thomas, one of the defendants, are both citizens of New York,

the cause can be removed into this court. 2d. As to the practice of removing causes from the state courts, when there are several defendants, and their appearance in the state court is entered at different times.

It is a well settled rule, and indeed has not been denied by the defendants' counsel, that when the jurisdiction of this court depends on the character of the parties, and such party, either plaintiff or defendant, consists of a number of individuals, each one must be competent to sue in the courts of the United States, or jurisdiction cannot be entertained. This is the general rule; the exceptions will be noticed hereafter. 3 Cranch, 267. And under this rule, this court, *prima facie*, cannot take jurisdiction of this cause; for Thomas, one of the defendants, is a citizen of the same state with the complainant.

It is very evident that Ward could not originally have filed his bill in this court against Thomas as one of the defendants, and it would seem to follow as a necessary consequence, that, if jurisdiction could not be entertained directly, it ought not to be acquired indirectly. But it is said that Thomas is only a nominal party, and that the jurisdiction of this court cannot be taken away in such case. If the fact be so, that he is a mere nominal party, there is no doubt it would not deprive this court of jurisdiction. It has been so decided by the supreme court in the case of *Brown v. Strode*, 5 Cranch, 303, and in *Wornly v. Wornly*, 8 Wheat., 451. In such cases the jurisdiction of the court depending upon the question whether the individual who is *prima facie* incompetent to appear in the courts of the United States is a real and substantial or only a nominal party, this court must of necessity go so far into the merits of the case as to enable it to decide that question.

Is Thomas, then, a nominal party only, in the sense in which that rule is to be understood? And we think he is not; but that he is a real and an indispensable party to the decision and final determination of the merits of this case. From the allegations in the bill, and the answers of Thomas, it appears that the deed for the land in question has been executed by the Arredondos, and placed in the hands of Thomas for delivery to Ward, upon his paying a sum of money, the amount not ascertained with certainty. The allegation in the bill is that \$5,000, which was more than the balance due, had been

tendered to Thomas and the deed demanded. The answer of Thomas admits that he was authorized by the Arredondos to deliver the deed upon the receipt of such sum (in addition to a balance of principal of about \$5,000, remaining due upon the contract) as he (Thomas) might think proper. He also admits the tender of the \$5,000; but that he demanded \$15,000 before he would deliver the deed. Thomas then, according to his admissions, held this deed in trust, with a discretionary power to deliver it upon the payment of such sum as he should demand over and above \$5,000. The \$5,000 was duly tendered, but he chose to demand \$10,000 more. He assumed then, either arbitrarily or upon his construction of the contract, to claim \$10,000 more than was admitted by the complainant to be due, and of course made himself, to a certain extent, a party to the merits of the question. And it was competent to the court of chancery to say whether, upon examination, he had abused his trust, and demanded that for which there was no color, or to have decreed a delivery of the deed upon payment of such sum as should be found justly due, or to have dismissed the bill, according as it should find the merits of the case on examination. But he was an essential party to enable the complainant to obtain the relief sought, viz., a title for the land. Thomas in his answer admits that Ward had paid upwards of \$35,000 upon the contract. Under the circumstances of this case, the very essence of the relief is to be obtained only by a decree against Thomas to deliver the deed.

In the case of *Wormly v. Wormly* the criterion by which it was determined whether a party was nominal or not was whether a decree against him was sought. The court said it would not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties, but will proceed without them and decide upon the merits of the case between the parties who have the real interest before it whenever it can be done without prejudice to the rights of others. Thomas, we think, is not a mere formal party, but that a decree against him is essential to the relief claimed, if the complainant is entitled to it. Whether he is or not, is a question upon which we give no opinion.

This view of the case leads to a denial of the motion, and remanding the cause to the state court, and renders it unnecessary to express any opinion upon the second point. But

as it is in a great measure a question of practice and may be applicable to other cases, it may not be amiss to express our present impressions on the point.

The state court had unquestionably jurisdiction of the cause. The complainant had, therefore, a right to go there for relief, and indeed, in this case, he must have commenced his suit in the state court. But the present question is, supposing the Arredondos, both aliens, were the only defendants, one having appeared in the state court and the other not, can the one who has appeared remove the cause and give the circuit court of the United States jurisdiction upon the merits? And we are inclined to think he cannot. We would be understood, however, as confining this rule to cases where, from the subject-matter of the suit, the judgment or decree must be joint. There may be cases in equity where the several parties represent distinct interests, so that separate decrees may be made, where possibly some of the parties may take the cause into the circuit court and others remain in the state court; but it ought, even in such cases, to be a very strong and palpable case of separate and distinct interests to sanction such a course. There is nothing disclosed in this case to bring it within any such rule. The interest is fairly to be presumed joint, and the cause must come entire or not at all into this court, before the merits can be decided.

Can, then, one of the alien defendants compel his co-defendant to follow him into this court against his will? We put the case thus strongly in order to test the principle. And we cannot discover any satisfactory ground upon which such a doctrine can be sustained. The judiciary act considers the removal of the cause as the voluntary act of the party and on his petition. By the word *party*, as here used, must necessarily be understood the defendant, embracing all the individuals, be they more or less, constituting such party.

This application to remove the cause must be made at the time of entering the appearance in the state court. But there is nothing that makes it necessary that such application should be made by all the defendants at the same time. This court is not possessed of the cause so as to proceed therein until all the defendants come here. But when the appearance in the state court shall be at different times by different defendants, there can be no objection to their appearance being entered in this court at different times; and indeed such a

construction of the act is indispensable, as the application for the removal must be made on entering the appearance in the state court; and when the defendants are numerous they may in suits, both at law and in equity, be brought into the state court at different times; and that court cannot cause the appearance then to be entered *nunc pro tunc*, so as to entertain the motion to remove the cause after all the defendants are brought into court. *Gibson v. Johnson*, 1 Pet., 44. But if all the defendants should not petition to have the cause removed into this court, so as to enable it to proceed, the cause may be remanded to the state court, so as to give it possession of the whole case. 4 Cranch, 421. An original appearance of some of the defendants cannot be entered in this court. The cause having been regularly commenced in the state court cannot be removed therefrom except in the mode prescribed by the act of congress; the appearance must first be entered in the state court, and the security then given to enter the appearance in this court; and then the state court is prohibited from proceeding any further in the cause. But until then it may proceed, and the effect might be in some cases that proceedings would be going on at the same time, in the same cause, in both courts. And this court is not authorized to take cognizance of the cause, unless removed in the manner pointed out by the act.

CHAPTER XV.

ENFORCEMENT OF PROCESS AND DECREE—AUXILIARY PROCEEDINGS.

Rule 8.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party can not be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

Rule 10.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every

person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.

Rule 89.

The circuit courts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

Rule 9.

When any decree or order is for the delivery or possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

Rule 34.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and, if a plea, that it is true in point of fact.

EQUITY PRACTICE IS ALSO AFFECTED BY THE FOLLOWING

GENERAL RULES OF PRACTICE OF THE SUPREME COURT:

Rule 3.

ENGLISH PRECEDENTS.

This court consider the practice of the Court of the King's (Queen's) Bench and of Chancery, in England, as affording outlines for the practice of this court; and they will, from time to time, make such alterations therein as circumstances may render necessary.

Rule 5.

PROCESS.

(1.) *Style.*

All process in this court shall be in the name of the President of the United States.

(2.) *Service on State.*

When process at common law or in equity shall issue against a state, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such state.

(3.) *When Served.*

Process of *subpoena* issuing out of the court in any suit in equity, shall be served on the defendant sixty days before the

return day of said process; and if the defendant, on such service of the *subpoena*, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

Rule 12.

EVIDENCE.

In all cases where further proof is ordered by the court, the depositions which shall be taken shall be by a commission to be issued from the court, or from any Circuit Court of the United States.

Rule 13.

OBJECTION TO EVIDENCE.

In all cases of equity and admiralty jurisdiction heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit found in the record, as evidence, unless objection was taken thereto in the court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

ADDENDA.

Supreme Court of the United States.

OCTOBER TERM, 1900.

It is ordered by the Court, That Section 1 of Rule 5 of this court be, and the same is hereby, amended so as to read as follows :

1. All processes of this court shall be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames, of the parties.

(Promulgated December 17, 1900.)

It is ordered by the Court, That the first sentence of Rule 12 of the Rules of Practice in Equity be, and the same is hereby, amended so as to read as follows :

Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the Christian names as well as the surnames of the parties, and shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof.

(Promulgated December 17, 1900.)

APPENDIX.



ORDINANCES MADE BY THE LORD CHANCELLOR BACON.

For the better and more regular administration of justice in the Chancery, to be daily observed, saving the prerogative of the court.

1. *Bill of Review.*

No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review; and no bill of review shall be admitted except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter which hath risen in time after the decree, and not any new proof which might have been used when the decree was made: nevertheless, upon new proof, that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise.

2. *Clerical Error.*

In case of miscasting, being a matter demonstrative, a decree may be explained, and reconciled by an order, without a bill of review; not understanding by miscasting, any pretended misrating or misvaluing, but only error in the auditing or numbering.

3. *Decree to be Performed.*

No bill of review shall be admitted, or any other new bill, to change matter decreed, except the decree be first obeyed and performed: as, if it be for land, that the possession be

yielded ; if it be for money, that the money be paid ; if it be for evidence, that the evidences be brought in ; and so in other cases which stand upon the strength of the decree alone.

4. *Right Saved.*

But if any act be decreed to be done which extinguisheth the parties' right at the common law, as making of assurance or release, acknowledging satisfaction, cancelling of bonds or evidences, and the like, those parts of the decree are to be spared until the bill of review be determined ; but such sparing is to be warranted by public order made in court.

5. *Surety.*

No bill of review shall be put in, except the party that prefers it enters into recognizance with sureties for satisfying of costs and damages for the delay, if it be found against him.

6. *Statute, Change of Construction.*

No decrees shall be made, upon pretense of equity, against the express provision of an act of Parliament ; nevertheless, if the construction of such act of Parliament hath for a time gone one way in general opinion and reputation, and after, by a later judgment, hath been controlled, then relief may be given upon matter of equity, for cases arising before the said judgment, because the subject was in no default.

7. *Contempt—Strait Custody.*

Imprisonment for breach of a decree is in nature of an execution, and therefore the custody ought to be strait, and the party not to have any liberty to go abroad, but by special license of the Lord Chancellor ; but no close imprisonment is to be, but by express order for willful and extraordinary contempts and disobedience, as hath been used.

8. *Penalties.*

In case of enormous and obstinate disobedience in breach of a decree, an injunction is to be granted "*subpoena*" of a

sum; and upon affidavit, or other sufficient proof, or persisting in contempt, fines are to be pronounced by the Lord Chancellor in open court, and the same to be estreated down into the hanaper, if cause be by a special order.

9. *Process for Lands.*

In case of a decree made for the possession of land, a writ of execution goes forth: and if that be disobeyed, then process of contempt according to the course of the court against the person, unto a commission of rebellion; and then a sergeant-at-arms by special warrant; and in case the sergeant-at-arms can not find him, or be resisted; or upon the coming in of the party, and his commitment, if he persist in disobedience, an injunction is to be granted for the possession; and in case that also be disobeyed, then a commission to the sheriff to put him into possession.

10. *Contemner Enlarged.*

Where a party is committed for the breach of a decree, he is not to be enlarged until the decree be fully performed in all things which are to be done presently. But if there be other parts of the decree to be performed at days, at times to come, then he may be enlarged by order of the court upon recognizance, with sureties to be put in for the performance thereof "*de futuro*," otherwise not.

11. *Decree, Binds Whom.*

Where causes come to a hearing in court, no decree bindeth any person who was not served with process "*ad audiendum judicium*," according to the course of the court, or did appear "*gratis*," in person in the court.

12. *Privies.*

No decree bindeth any that cometh in "*bona fide*," by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor the order; but where he comes in "*pendente lite*," and while the suit is in full prose-

cution, and without any color of allowance or privity of the court, there regularly the decree bindeth; but if there were any intermission of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice.

13. *Res Judicata.*

Where causes are dismissed upon full hearing, and the dismissal signed by the Lord Chancellor, such causes shall not be retained again, nor new bill exhibited, except it be upon new matter, like to the case of the bill of review.

14. *Former Judgment.*

In case of all other dismissions, which are not upon hearing of the cause, if any new bill be brought, the dismissal is to be pleaded, and after reference and report of the contents of both suits, and consideration taken of the former orders and dismissal, the court shall rule the retaining and dismissing of the new bill, according to justice and nature of the case.

15. *Suits on Void Contracts.*

All suits grounded upon wills nuncupative, leases parol, or upon long leases that tend to the defeating of the king's tenures, or for the establishment of perpetuities, or grounded upon remainders put into the crown to defeat purchasers; or for brokerage or rewards to make marriages; or for bargains at play or wages; or for bargains for offices contrary to the statute of 5 and 6 Ed. VI., or for contracts upon usury or simony, are regularly to be dismissed upon motion, if they be the sole effect of the bill; and if there be no special circumstances to move the court to allow their proceedings, and all suits under the value of ten pounds are regularly to be dismissed. V. postea, secs. 58, 60.

16. *Dismissions.*

Dismissions are properly to be prayed, and had either upon the hearing or upon plea unto the bill, when the cause comes

first in court : but dismissions are not to be prayed after the parties have been at charge of examination, except it be upon special cause.

17. *Discontinuance.*

If the plaintiff discontinue the prosecution, after all the defendants have answered, above the space of one whole term, the cause is to be dismissed of course without any motion ; but after replication put in no cause is to be dismissed without motion and order of the court.

18. *Election.*

Double vexation is not to be admitted ; but if the party sue for the same cause at the common law and in chancery, he is to have a day given to make his election where he will proceed, and in default of making such election to be dismissed.

19. *Certiorari.*

Where causes are removed by special "*certiorari*," upon a bill containing a matter of equity, the plaintiff is, upon receipt of his writ, to put in bond to prove his suggestions within fourteen days after the receipt ; which, if he does not prove, then upon certificate from either of the examiners, presented to the Lord Chancellor, the cause shall be dismissed with costs, and a "*procedendo*" to be granted.

20. *No Injunction Ex Parte.*

No injunction of any nature shall be granted, revived, dissolved or stayed upon any private petition.

21. *Injunction to Stay Action.*

No injunction to stay suits at common law shall be granted upon priority of suit only, or upon surmise of the plaintiff's bill only ; but upon matter confessed in the defendant's answer, or matter of record, or writing plainly appearing, or when the defendant is in contempt for not answering, or that the debt

desired to be stayed appeareth to be old, and hath slept long, or the creditor or the debtor hath been dead some good time before the suit brought.

22. *Temporary Injunction.*

Where the defendant appears not, but sits an attachment; or when he doth appear and departs without answer, and is under attachment for not answering; or when he takes oath he can not answer without sight of evidences within the country; or where, after answer, he sues at common law by attorney, and absents himself beyond seas: in these cases an injunction is to be granted for the stay of all suits at common law until the party answer or appear in person in court, and the court give further order; but, nevertheless, upon answer put in, if there be no motion made the same term, or the next general seal after the term, to continue the injunction in regard of the insufficiency of the answer put in, or in regard of matter confessed in the answer, then the injunction to die and dissolve without any special order.

23. *Stay in Loco of Injunction.*

In the case aforesaid, where an injunction is to be awarded for stay of suits at the common law, if like suits be in the chancery, either by "*scire facias*," or privilege, or English bill, then the suit is to be stayed by order of the court, as it is in other courts by injunction, for that the court cannot enjoin itself.

24. *Delay Dissolves.*

Where an injunction hath been obtained for staying of suits, and no prosecution is had for the space of three terms, the injunction is to fall of itself without further motion.

25. *Injunction After Arrest.*

Where a bill comes in after an arrest at the common law for debt, no injunction shall be granted without bringing the principal money into court, except there appear in the defend-

ant's answer, or by sight of writings, plain matter tending to discharge the debt in equity ; but if an injunction be awarded and disobeyed, in that case no money shall be brought in, or deposited, in regard of the contempt.

26. *For Possession.*

Injunctions for possession are not to be granted before a decree, but where the possession hath continued by the space of three years, before the bill exhibited, and upon the same title ; and not upon any title, by lease, or otherwise determined.

27. *Same.*

In case where the defendant sits all the process of contempt, and can not be found by the sergeant-at-arms, or resists the sergeant, or makes rescue, a sequestration shall be granted of the land in question ; and if the defendant render not himself within the year, then an injunction for the possession.

28. *Against Waste.*

Injunctions against felling of timber, plowing up of ancient pastures, or for the maintaining of inclosures, or the like, shall be granted according to the circumstances of the case ; but not in case where the defendant upon his answer claimeth an estate of inheritance, except it be where he claimeth the land in trust, or upon some other special ground.

29. *Sequestration.*

No sequestration shall be granted but of lands, leases or goods in question, and not of any other lands or goods not contained in the suits.

30. *Same.*

Where a decree is made for rent to be paid out of land, or a sum of money to be levied out of the profits of land, there a sequestration of the same lands, being in the defendant's hands, may be granted.

31. *Ancillary Bill.*

Where the decrees of the provincial council, or of the court of requests, or the Queen's Court, are by contumacy of other means interrupted, there the Court of Chancery, upon a bill preferred for corroborations, of the same jurisdictions, decrees, and sentences shall give remedy.

32. *Evidence, Order of.*

Where any cause comes to a hearing, that hath been formerly decreed in any other of the King's Courts at Westminster, such decree shall be first read, and then to proceed to the rest of the evidence on both sides.

33. *Suits After Judgment.*

Suits after judgment may be admitted according to the ancient custom of the chancery, and the late royal decision of his majesty, of record, after solemn and great deliberation ; but in such suits it is ordered, that bond be put in with good sureties to prove the suggestions of the bill.

34. *Same, Decree in.*

Decrees upon suits brought after judgment shall contain no words to make void or weaken the judgment, but shall only correct the corrupt conscience of the party, and rule him to make restitution, or perform other acts, according to the equity of the cause.

35. *Registers.*

The registers are to be sworn, as has been lately ordered.

36. *Former Orders to be Shown by.*

If any order shall be made, and the court not informed of the last material order formerly made, no benefit shall be taken by such order, as granted by abuse and surreption, and to that end the registers ought duly to mention the former order in the latter.

37. *Orders to be Entered by.*

No order shall be explained upon any private petition but in court as they are made, and the register is to set down the orders as they are pronounced by the court, truly at his peril without troubling the Lord Chancellor by any private attending of him, to explain his meaning; and if any explanation be desired, it is to be done by public motion, where the other party may be heard.

38. *Orders, Copy of.*

No draught of any order shall be delivered by the register to either party, without keeping a copy by him, to the end that if the order be not entered, nevertheless the court may be informed what was formerly done, and not put to new trouble and hearing; and to the end also that knowledge of orders be not kept back too long from either party, but may presently appear at the office.

39. *Order of Reference.*

Where a cause hath been debated upon hearing of both parties, and opinion hath been delivered by the court, and, nevertheless, the cause referred to treaty, the registers are not to admit the opinion of the court, in drawing of the order of reference, except the court doth especially declare that it be entered without any opinion either way; in which case, nevertheless, the registers are out of their short note to draw up some more full remembrance of that passed in court, to inform the court if the cause come back and cannot be agreed.

40. *Suggestions of Counsel.*

The registers, upon sending of their draught unto the counsel of the parties, are not to respect the interlinations or alterations of the said counsel, be the said counsel ever so great, farther than to put them in remembrance of that which was truly delivered in court, and so to conceive the order upon their oath and duty, without any further respect.

41. *Decrees to be Read.*

The registers are to be careful in the penning and drawing up of decrees, and of special matters of difficulty and weight; and, therefore, when they present the same to the Lord Chancellor, they ought to give him understanding which are such decrees of weight, that they may be read and reviewed before his lordship sign them.

42. *Decrees at Rolls.*

The decrees granted at the rolls are to be presented to his lordship, with the orders whereupon they are drawn within two or three days after every term.

43. *Order for Injunction.*

Injunctions for possession or for stay of suits after verdict, are to be presented to his lordship, together with the orders whereupon they go forth, that his lordship may take consideration of the order before he sign them.

44. *Order Against Rules.*

Where any order upon the special nature of the case shall be made against any of these general rules, there the register shall plainly and expressly set down the particulars, reasons and grounds moving the court to vary from the general use.

45. *Chancellor to Rule on Jurisdiction.*

No reference upon demurrer or question touching the jurisdiction of the court shall be made to the masters of the chancery; but such demurrers shall be heard and ruled in court, or by the Lord Chancellor himself.

46. *Report, Time to Object to.*

No order shall be made for the confirming or ratifying of any report without day first given, by the space of a seven-ight at the least, to speak to it in court.

47. *No Reference After Examination.*

No reference shall be made to any masters of the court, or any other commissioners, to hear and determine, where the cause is gone so far as to examination of witnesses, except it be in special causes of parties near in blood, or of extreme poverty, or by consent and general reference of the cause, except it be by consent of the parties to be sparingly granted.

48. *Report, Beyond Order.*

No report shall be respected in court which exceedeth the warrant of the order of reference.

49. *Master, Duty of.*

The masters of the court are required not to certify the state of any cause, as if they would make breviate of the evidence on both sides, which doth little ease the court, but with some opinion ; or, otherwise, in case they think it too doubtful to give opinion, and therefore make such special certificate, the cause is to go on to a judicial hearing without respect had to the same.

50. *Account—Reference—Directions.*

Matters of account, unless it be in very weighty causes, are not fit for the court, but to be prepared by reference, with this difference, nevertheless, that the cause comes first to a hearing ; and upon the entrance into a hearing, they may receive some direction, and be turned over to have the accounts considered, except both parties, before a hearing, do consent to a reference of the examination of the accounts, to make it more ready for a hearing.

51. *Court-Rolls—Same.*

The like course to be taken for the examination of court-rolls upon customs and copies, which shall not be referred to any one master, but to two masters at the least.

52. *Answer, Exception to.*

No reference to be made of the insufficiency of an answer without showing of some particular point of the defect, and not upon surmise of the insufficiency in general.

53. *Same, Trust Confessed.*

Where a trust is confessed by the defendant's answer, there needeth no further hearing of the cause, but a reference presently to be made upon the account, and so to go on to hearing of the accounts.

54. *Costs on Frivolous Suit.*

In all suits where it shall appear, upon the hearing of the cause, that the plaintiff had not "*probabilem causam litigandi*," he shall pay unto the defendant his utmost costs, to be assessed by the court.

55. *Fine for Prolix Pleading.*

If any bill, answer, replication, or rejoinder shall be found of an immoderate length, both the party and the counsel under whose hand it passeth shall be fined.

56. *Scandal and Impertinence.*

If there be contained in any bill, answer or other pleadings, or interrogatory, any matter libellous or slanderous against any that is not a party to the suit, or against such as are parties to the suit, upon matters impertinent, or in derogation of the settled authorities of any of his majesty's court, such bills, answers, pleadings or interrogatories, shall be taken off the file and suppressed, and the parties severally punished by commitment or ignominy as shall be thought fit for the abuse of the court: and the counselors at law, who have set their hands, shall likewise receive reproof or punishment if cause be.

57. *Demurrers and Pleas, Heard When.*

Demurrers and pleas which tend to discharge the suit shall be heard first upon every day of orders, that the subject may know whether he shall need further attendance or no.

58. *Same—Definition.*

A demurrer is properly upon matter defective, contained in the bill itself, and no foreign matter; but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed, or excommunicated; or there is another bill depending for the same cause, or the like; and such plea may be put in without oath, in case where the matter of the plea appear upon record; but if it be anything that does not appear upon record the plea must be upon oath.

59. *Certain Pleas.*

No plea of outlawry shall be allowed without pleading the record "*sub pede sigilli*;" nor plea of excommunication, without the seal of the ordinary.

60. *Demurrer to Suits on Void Contracts.*

Where any suit appeareth upon the bill to be of the natures which are regularly to be dismissed according to the fifteenth ordinance, such matter is to be set forth by way of demurrer

61. *Answer Insufficient, Costs on.*

Where an answer shall be certified insufficient, the defendant is to pay costs; and if a second answer be returned insufficient, in the points before certified insufficient, then double costs, and upon the third, treble costs, and upon the fourth, quadruple costs, and then to be committed also until he hath made a perfect answer, and to be examined upon interrogatories touching the points defective in his answer: but if any answer be certified sufficient, the plaintiff is to pay costs.

62. *Same—Waiver of.*

No insufficient answer can be taken hold of after replication put in, because it is admitted sufficient by the replication.

63. *Denials in Answer.*

An answer to a matter charged as the defendant's own fact must be direct, without saying it is to his remembrance, or as he believeth, if it be laid down within seven years before; and if the defendant deny the fact, he must traverse it directly, and not by way of negative pregnant; as if a fact be laid to be done with divers circumstances, the defendant may not traverse it literally as it is laid in the bill, but must traverse the point of substance; so if he be charged with the receipt of one hundred pounds, he must traverse that he hath not received a hundred pounds, or any part thereof; and if he have received part, he must set forth what part.

64. *Hearing on Bill and Answer.*

If a hearing be prayed upon bill and answer, the answer must be admitted to be true in all points, and a decree ought not to be made, but upon hearing the answer read in court.

65. *No Counsel—Answer Read.*

Where no counsel appears for the defendant at the hearing, and the process appears to have been served, the answer of such defendant is to be read in court.

66. *Replication.*

No new matter is to be contained in any replication, except it be to avoid matter set forth in the defendant's answer.

67. *Copies.*

All copies in chancery shall contain fifteen lines in every sheet thereof, written orderly and unwastefully, unto which shall be subscribed the name of the principal clerk of the office where it is written, or his deputy for whom he will answer, for which only subscription no fee at all shall be taken.

68. *Commissions—Depositions.*

All commissions for examinations of witnesses shall be "*super interr. inclusis*" only, and no return of depositions into

the court shall be received but such only as shall be either compromised in one roll subscribed with the name of the commissioners, or else in divers rolls, whereof each one shall be so subscribed.

69. *Same—Joinder in.*

If both parties join in commission, and upon warning given the defendant bring his commissioners, but produceth no witnesses, nor ministereth interrogatories, but after seek a new commission, the same shall not be granted; but, nevertheless, upon some extraordinary excuse of the defendant's default, he may have liberty granted by special order to examine his witnesses in court upon the former interrogatories, giving the plaintiff or his attorney notice that he may examine also if he will.

70. *Examination of Defendant.*

The defendant is not to be examined upon interrogatories, except it be in very special cases, by express order of the court, to sift out some fraud or practice pregnantly appearing to the court, or otherwise upon offer of the plaintiff to be concluded by the answer of the defendant without any liberty to disprove such answer, or to impeach him after a perjury.

71. *Record of Other Causes.*

Decrees in other courts may be read upon hearing without the warrant of any special order; but no depositions taken in any other court are to be read but by special order; and regularly the court granteth no order for reading of depositions, except it be between the same parties, and upon the same title and cause of suit.

72. *Impeaching Witness.*

No examination is to be had of the credit of any witness but by special order, which is sparingly to be granted.

73. *Evidence in Perpetuum.*

Witnesses shall not be examined "*in perpetuum rei memoriam*," except it be on the ground of a bill first put in, an answer thereunto made, and the defendant or his attorney made acquainted with the names of the witnesses that the plaintiff would have examined, and so publication to be of such witnesses; and this restraint nevertheless that no benefit shall be taken of the depositions of such witnesses, in case they may be brought "*viva voce*" upon the trial, but only to be used in case of death before the trial, or age, or impotency, or absence out of the realm at the trial.

74. *No Testimony After Publication.*

No witnesses shall be examined after publication, except it be by consent or by special order, "*ad informandum conscientiam judicis*," and then to be brought close sealed, up to the court to peruse or publish, as the court shall think good.

75. *Affidavit not Evidence.*

No affidavit shall be taken or admitted by any master of the chancery tending to the proof or disproof of the title or matter in question, or touching the merits of the cause; neither shall any such matter be colorably inserted in any affidavit for serving of process.

76. *Counter Affidavit.*

No affidavit shall be taken against affidavit, as far as the masters of chancery can have knowledge; and if any such be taken, the latter affidavit shall not be used nor read in court.

77. *Contempts, Proceeding in.*

In case of contempt grounded upon force or ill words upon serving of process, or upon words of scandal of the court proved by affidavit, the party is forthwith to stand committed; but for other contempts against the orders or decrees of the court, an attachment goes forth: first upon an affidavit made,

and then the party is to be examined upon interrogatories, and his examination referred: and if, upon his examination, he confess matter of contempt, he is to be committed: if not, the adverse party may examine witnesses to prove the contempt; and, therefore, if the contempt appear the party is to be committed; but, if not, or if the party that pursues the contempt do fail in putting in interrogatories, or other prosecution, or fail in the proof of the contempt, then the party charged with the contempt is to be discharged with good costs.

78. *Contemner not to be Heard.*

They that are in contempt, specially so far as proclamation of rebellion, are not to be heard, neither in that suit, nor any other, except the court of special grace suspend the contempt.

79. *Discharged, When.*

Imprisonment upon contempt for matters past may be discharged of grace after sufficient punishment or otherwise dispensed with; but, if the imprisonment be for not performance of any order of the court in force, they ought not to be discharged except they first obey, but the contempt may be suspended for a time.

80. *No Extraordinary Order Ex Parte.*

Injunction, sequestrations, dismissions, retainers upon dismissions, or final orders, are not to be granted upon petitions.

81. *Former Order Altered, How.*

No former order made in court is to be altered, crossed, or explained upon any petition; but such orders may be stayed upon petition for a small stay, until the matter may be moved in court.

82. *No Ex Parte Order on Depositions.*

No commission for examination of witnesses shall be discharged, nor no examinations or deposition shall be suppressed

upon petition, except it be upon point of course of the court first referred to the clerks, and certificate thereupon.

83. *Same, on Demurrer.*

No demurrer shall be overruled upon petition.

84. *Scire Facias.*

No "*scire facias*" shall be awarded upon recognizances not enrolled, nor upon recognizances enrolled, unless it be upon examination of the record with the writ; nor no recognizance shall be enrolled after the year, except it be upon special order from the Lord Chancellor.

85. *Extraordinary Process.*

No writ of "*ne creat regnum*," prohibition, consultation, statute of Northampton, "*certiorari*" special, "*procedendo*" special, or "*certiorari*" or "*procedendo*" general, more than once in the same cause; *habeas corpus*, or "*corpus cum causa, vi laica removenda*," or restitution thereupon, "*de coronatore et vicidario eligendo*," in case of a moving "*de homine repley, assiz*," or special patent, "*de ballivo amorcna, certiorari super præsensationibus fact. coram commissariis, sevar*," or "*ad quod damnum*," shall pass without warrant under the Lord Chancellor's hand, and signed by him, save such writs "*ad quod damnum*," as shall be signed by master attorney.

86. *Writs of Privilege.*

Writs of privilege are to be reduced to a better rule, both for the number of persons that shall be privileged, and for the case of the privilege; and as for the number, it shall be set down by schedule; for the case, it is to be understood, that besides persons privileged as attendants upon the court suitors and witnesses are only to have privilege "*eundo, redeundo, et morando*," for their necessary attendance, and not otherwise; and that such writ of privilege dischargeeth only an arrest upon the first process, but yet, where at such times

of necessary attendance the party is taken in execution, it is a contempt to the court, and accordingly to be punished.

87. *Supplicavit.*

No "*supplicavit*" for the good behavior shall be granted, but upon articles grounded upon the oath of two at the least, or certificate upon any one justice of assize, or two justices of the peace, with affidavit that it is in their hands, or by order of the star chamber, or chancery, or other of the king's courts.

88. *Peace Bond.*

No recognizance of the good behavior, or the peace, taken in the country, and certified into the petty-bag, shall be filed in the year without warrant from the Lord Chancellor.

89. *Ne Exeat Regno.*

Writs of "*ne exeat regno*" are properly to be granted according to the suggestion of the writ, in respect of attempts prejudicial to the king and state, in which case the Lord Chancellor will grant them upon prayer of any of the principal secretaries without cause showing, or upon such information as his lordship shall think of weight; but otherwise also they may be granted, according to the practice of long time used, in case of interlopers in trade, great bankrupts, in whose estate many subjects are interested, or other cases that concern multitudes of the king's subjects, also in cases of duels, and divers others.

90. *Return of Process.*

All writs, certificates, and whatsoever other process "*ret. coram Rege in Canc.*," shall be brought into the chapel of the rolls, within convenient time after the return thereof, and shall be there filed upon their proper files and bundles as they ought to be; except the deposition of witnesses, which may remain with any of the six clerks by the space of one year next after

the cause shall be determined by decree, or otherwise be dismissed.

91. *Injunction, to be Enrolled.*

All injunctions shall be enrolled, or the transcript filed, to the end that, if occasion be, the court may take order to award writs of "*scire facias*" thereupon, as in ancient time hath been used.

92. *Return-Day, Calendar.*

All days given by the court to sheriffs to return their writs, or bring in their prisoners upon writs of privilege, or otherwise between party and party, shall be filed, either in the register's office, or in the petty-bag, respectively; and all recognizances, taken to the king's use or unto the court, shall be duly enrolled in convenient time with the clerks of the enrollment, and calendars made of them, and the calendars, every Michaelmas term, to be presented to the Lord Chancellor.

93. *Charitable Uses, Commission.*

In case of suits upon the commission for charitable uses, to avoid charges, there shall need no bill, but only exceptions to the decree, an answer forthwith to be made thereunto; and thereupon, and upon sight of the inquisition, and the decree brought unto the Lord Chancellor by the clerk of the petty-bag, his lordship, upon perusal thereof, will give order under his hand for an absolute decree to be drawn up.

94. *Commissioners of Sewers, Appointed, How.*

Upon suit for the commission of sewers, the names of those that are desired to be commissioners are to be presented to the Lord Chancellor in writing; then his lordship will send the name of some privy counselor, lieutenant of the shire, or justice of assize, being resident in the parts for which the commission is prayed, to consider of them, that they be not put in for private respects; and upon the return of such opinion

his lordship will give further orders for the commission to pass.

95. *Tenure of Office.*

No new commission of sewers shall be granted while the first is in force, except it be upon discovery of abuse or fault in the first commissioners, or otherwise upon some great or weighty ground.

96. *Commission of Bankruptcy.*

No commission of bankrupt shall be granted but upon petition first exhibited to the Lord Chancellor, together with the names presented of which his lordship will take consideration, and always mingle some learned in the law with the rest; yet so as care be taken that the same parties be not too often used in commissions; and likewise care is to be taken that bond with good security be entered into, in £200 at least, to prove him a bankrupt.

97. *Commission of Delegates.*

No commission of delegates in any cause of weight shall be awarded, but upon petition preferred to the Lord Chancellor, who will name the commissioners himself, to the end they may be persons of convenient quality, having regard to the weight of the cause and the dignity of the court from whence the appeal is.

98. *Poor Persons.*

Any man shall be admitted to defend "*poorum pauperum*," upon oath, but for plaintiffs they are ordinarily to be referred to the courts of request, or to the provincial councils, if the case arise in those jurisdictions, or to some gentleman in the country, except it be in some special cases of commiseration, or potency of the adverse party.

99. *Insurance Suits.*

Licenses to collect for losses by fire or water are not to be granted, but upon good certificate; and not for decays, or suretyship, or debt or any other casualties whatsoever, and they are rarely to be renewed; and they are to be directed over unto the county where the loss did arise, if it were by fire, and the counties that abut upon it, as the case shall require; and if it were by sea, then unto the county where the port is from whence the ship went, and to some sea-counties adjoining.

100. *Exemplifications.*

No exemplification shall be made of letters patent, "*inter alia*," with omission of the general words; nor of records made void or cancelled; nor of the decrees of this court not enrolled; nor of depositions by parcel and fractions, omitting the residue of the depositions in court, to which the hand of the examiner is not subscribed; nor the records of the court not being enrolled or filed; nor of records of any other court, before the same be duly certified to this court, and orderly filed here; nor of any records upon the sight and examination of any copy in paper, but upon sight and examination of the original.

101. *Amendments.*

And because time and experience may discover some of these rules to be inconvenient, and some other to be fit to be added; therefore his lordship intendeth in any such case from time to time to publish any such revocations or additions.

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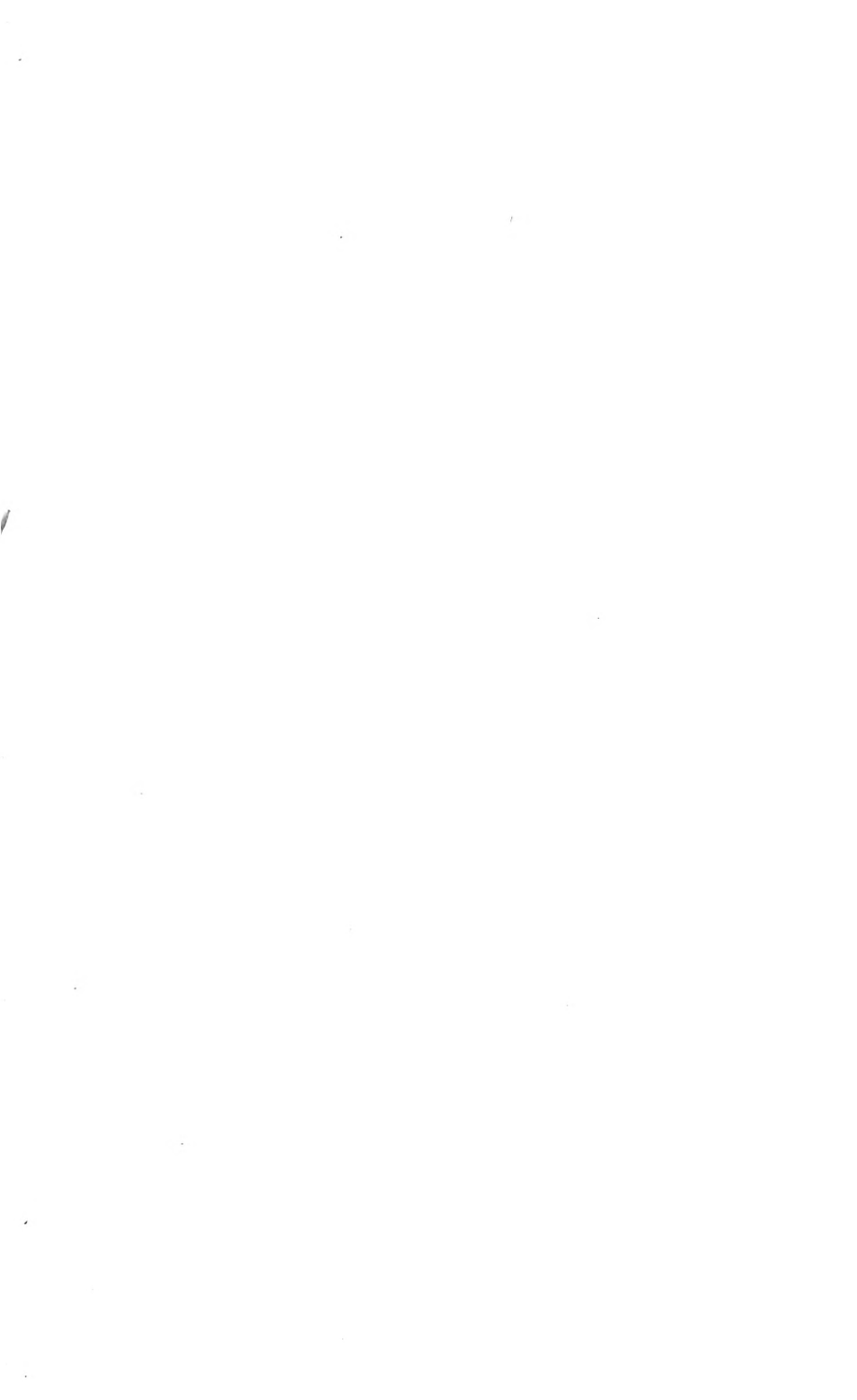
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